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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

—against—

THE LUMMUS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 22, 1961

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	15
Point I	15
Point II	21
Point III	25
Point IV	28
Conclusion	33

Table of Cases Cited

PAGE

Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955) 29

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 16, 19

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959) 17, 19

Beucke v. *Weick*, 275 F.2d 38 (6th Cir. 1960) .. 20

Benson Hotel Corp. v. *Woods*, 168 F.2d 694 (8th Cir. 1948) 24

Byram Concretanks, Inc. v. *Meaney*, 286 F.2d 170 (3d Cir. 1961) 20

Chas. Wolff Packing Co. v. *Court of Industrial Relations*, 262 U.S. 522 (1923) 4, 28, 29

Chicago Great Western Ry. v. *Chicago, Burlington & Quincy Ry.*, 193 F.2d 975 (8th Cir. 1952) 24

Ciletti v. *Union Pac. Ry.*, 196 F.2d 50 (2d Cir. 1952) ..... 32n.

DeForest Radio Telephone & Telegraph Co. v. *Westinghouse Elec. & Mfg. Co.*, 13 F.2d 1014 (E.D. Pa. 1942), *aff'd*, 21 F.2d 918 (3d Cir. 1927), *aff'd per curiam*, 278 U.S. 562 (1928) 24

Doeskin Products Inc. v. *United Paper Co.*, 195 F.2d 356 (7th Cir. 1952) 24

Dorchy v. *Kansas*, 264 U.S. 286 (1924) 4, 28, 29

Ex parte Chicago, R.I. & Pac. Ry., 255 U.S. 273 (1921) 19

Ex parte Harding, 219 U.S. 363 (1911) 19

Ex parte Hoard, 105 U.S. 578 (1882) 19

PAGE

Ex parte Park Square Automobile Station, 244 U.S. 412 (1917) 19
Ex parte Peterson, 253 U.S. 300 (1920) 17
Ex parte Roe, 234 U.S. 70 (1914) 19
Ex parte Simons, 247 U.S. 231 (1918) 17
Ex parte Wagner, 249 U.S. 465 (1919) 27

Finsilver, Still & Moss v. *Goldberg, Maas & Co.*, 253 N.Y. 382, 171 N.E. 579 (1930) 30
Frost & Frost Trucking Co. v. *Railroad Comm'n.*, 271 U.S. 583 (1926) 32

Green v. *Murphy*, 259 F.2d 591 (3d Cir. 1958) .. 20
Gulf Research & Development Co. v. *Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd by an equally divided Court on other issues*, 344 U.S. 861 (1952) 19

Hoffa v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960) ...20, 27
Hoffman v. *Blaski*, 363 U.S. 335 (1960), 3, 21, 22, 22n., 24
Hotel Corp. of Cleveland v. *United States Dist. Ct.*, 283 F.2d 470 (6th Cir. 1960) 20
Hunter v. *Atchison, T. & S.F. Ry.*, 188 F.2d 294 (7th Cir. 1951) 24

In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961) 13, 16

Kloeb v. *Armour & Co.*, 311 U.S. 199 (1940), 3, 15n., 21, 23, 24

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 3, 13, 15, 16, 17, 19, 20

Missouri-Kansas-Texas R.R. v. *Randolph*, 182 F. 2d 996 (8th Cir. 1950) 24

PAGE

Parr v. *United States*, 351 U.S. 513 (1956) 19

Robert Lawrence Co. v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed on stipulation*, 364 U.S. 801 (1960) ..... 30, 32n.

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 19

Simmons Co. v. *Grier Bros. Co.*, 258 U.S. 82 (1922) 25

Smith's Transfer Corp. v. *Barksdale*, 259 F.2d 498 (4th Cir. 1958) 20

TCF Film Corp. v. *Gourley*, 240 F.2d 711 (3d Cir. 1957) 20

United States v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950) 24

United Steelworkers of America v. *United States*, 361 U.S. 39 (1959) 29

CONSTITUTION

U.S. Const. Amend. V ..... 4, 28, 28n.

U.S. Const. Amend. XIV 4, 28, 28n., 29

STATUTORY MATERIALS

28 U.S.C.:

§ 71 (former) 23

§ 80 (former) 23

PAGE

§ 1254(1) 2
§ 1291 ..... 4, 13, 18n., 21
§ 1292(a)(1) 3, 4, 9, 13
§ 1292(b) 4, 12, 20, 21
§ 1332 8
§ 1359 23
§ 1441(a) 8
§ 1447(c), (d) 23
§ 1651 ..... 3, 4

New York Civil Practice Act:

§ 112-g ..... 32n.

MISCELLANEOUS

75 HARV. L. REV. 351 (1961) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

—against—

THE LUMMUS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of The United States:

Commonwealth Oil Refining Company, Inc. (hereafter "Commonwealth"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered against The Honorable Archie O. Dawson, District Judge of the United States District Court for the Southern District of New York.*

The judgment of the Second Circuit grants a petition by The Lummus Company (hereafter "Lum-

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* Commonwealth appears herein and prays leave to be heard as the party aggrieved by the judgment of the Court of Appeals.

mus"), for issuance of a writ of mandamus vacating an order of Judge Dawson dated June 22, 1961.

Judge Dawson's order (a) directed a trial in the District Court of issues concerning the making of certain alleged "contracts" between Commonwealth and Lummus and concerning the arbitrability of certain claims in dispute between them, and (b) stayed all proceedings in connection with an arbitration demanded by Lummus, pending determination of those issues by the District Court.

Citations to Opinions Below

The opinion of Judge Dawson, dated June 7, 1961, is reported at 195 F. Supp. 572 (1961), and is printed in the certified Joint Appendix at R. 675-83, and at S.A. 73-82.* Judge Dawson's order of June 22, 1961, entered upon the opinion of June 7, 1961, is printed at R. 747-48, and at S.A. 83-85.

The opinion of the Court of Appeals for the Second Circuit, not yet reported, is printed in the certified proceedings below at R. 988-1012, and at S.A. 86-114.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision and judgment of the Court of Appeals were entered on November 14, 1961 (R. 988-1016, S.A. 86-117).

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* "R." references are to pages of the certified Joint Appendix as printed for the use of the court below (R. 1-757) and to pages of the certified proceedings in the court below (R. 758-1043). Each has been duly certified and filed with the Clerk of this Court pursuant to Rule 21(3). "S.A." references are to pages of the Supplemental Appendix filed herewith containing certain opinions and orders frequently referred to herein.

Questions Presented

1. Whether a Court of Appeals has extended the extraordinary power of mandamus beyond the limits established under the All Writs Act, 28 U.S.C. § 1651, as construed in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and other decisions of this Court, by granting mandamus to vacate the non-appealable interlocutory order of a District Judge, ultimately reviewable on appeal, by which that judge directs a trial of certain issues, the sole ground for mandamus being that the District Judge did not give "conclusive" effect, or the effect of "finality", to a previous decision of another Court of Appeals, rendered on an interlocutory appeal in a related proceeding between the same parties.

2. Whether a Court of Appeals has rendered a decision in conflict with *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940), and other decisions of this Court, by determining that "conclusive" effect, or the effect of "finality", must be given in an action before a District Court of its Circuit to a previous decision of another Court of Appeals rendered on an interlocutory appeal under 28 U.S.C. § 1292(a)(1), in a related proceeding between the same parties.

3. Whether a Court of Appeals has extended the extraordinary power of mandamus beyond the limits established under the All Writs Act, 28 U.S.C. § 1651, where, on review had solely under the All Writs Act, it includes in its grant of mandamus a direction that a District Court may not try certain issues, solely on the ground that the Court of Appeals would reverse any decision in favor of the contentions of one of the parties with respect to such issues when such decision

ultimately became appealable in normal course, having itself determined, on facts presented solely by affidavit, that the contentions of the other party with respect to those issues were correct.

4. Whether a Court of Appeals has enforced a procedure of compulsory arbitration in violation of the Fifth and Fourteenth Amendments to the Constitution, as construed in *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), and *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923), and has thereby deprived a party of property and liberty without due process of law, by granting mandamus to prohibit a judicial determination of that party's defense to a petition to compel arbitration that, by virtue of fraudulent inducement, it has not consented to arbitration.

Statutes Involved

The statutory provision principally involved is 28 U.S.C. § 1651. Also involved are 28 U.S.C. §§ 1291, 1292(a)(1), and 1292(b). The texts of these provisions are printed, *infra*, pp. 34-35.

Statement of the Case

This litigation grows out of two alleged "contracts" by which Lummus undertook to design, construct and guarantee performance and operability of two oil refineries for Commonwealth, to be located in Puerto Rico. Commonwealth undertook to pay Lummus a total guaranteed maximum cost of $34,985,400 (R. 14, 112-13, 123). The "contracts" contained identical arbitration clauses, *infra*, p. 35.

At stake is Commonwealth's right to a trial of its charge that it was fraudulently induced by Lummus to enter into these contracts, and its concomitant right not to be compelled to arbitrate disputed claims pursuant to contracts which it claims do not exist.

Throughout the course of the litigation Commonwealth has sought a trial of the fraud issue in a United States District Court and, ultimately, an authoritative judicial determination of the standards which must govern the conduct and performance of professional engineers. Lummus seeks to avoid any judicial determination and to submit all issues, including those determinative of the existence of the contracts, to arbitrators appointed under the terms of the arbitration clause.

Commonwealth's charge of fraud is fully supported by affidavits and documents. Three United States Judges (Ruiz Nazario, J., of the District of Puerto Rico; Magruder, J., sitting by assignment in Puerto Rico; and Dawson, J., of the Southern District of New York)* have separately held that Commonwealth by these supporting materials, not sufficiently denied or explained by Lummus, has raised substantial issues of fraudulent inducement of the contracts.**

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* The opinion of Magruder, J., is reported at 174 F. Supp. 485 (D.P.R. 1959), and is printed at R. 577-87, and at S.A. 1-13. The opinion of Ruiz Nazario, J., has not been reported but is printed at R. 509-24, and at S.A. 14-32.

** The refineries have in fact been designed and constructed by Lummus but, as so designed and constructed, have proved, as Lummus knew they would prove, wholly incapable of fulfilling representations made by Lummus in precontract negotiations as to the quantities and proportions of finished products the refineries would be capable of producing, and the cost of their production.

These representations had been basic to the refinery project. They had been based on fundamental engineering calculations by Lummus of the quantities and proportions of finished products that

As a result of these holdings, Judges Ruiz Nazario and Dawson have directed that there be a district court trial of the fraud issues.

Judge Dawson, moreover, found that substantial issues had been raised by an additional Commonwealth contention that the arbitration clause, even if valid, was not applicable to certain claims of the

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could be extracted from the available crude oils, and of the cost of the refinery equipment necessary to produce such finished products (R. 232-35, 392). Lummus' representations were relied upon by Commonwealth in "contracting" with Lummus to build the refineries and induced Commonwealth's decision to embark on the project and to incur debt for its financing (R. 393, 417, 133-38; *cf.* R. 394-98, 400-04; see, *e.g.*, R. 239-58, 268-74, 318-20; for their use in connection with the financing of Commonwealth, see R. 420-21, 275-87, 136-38).

The falsity of these representations (R. 411, 583, 518), as Commonwealth's proofs tendered on rehearing in the First Circuit showed (R. 533-74), was not discovered by Commonwealth until March 1959 and, in essence, turned on the undisclosed precontract substitution of a highly experimental design of equipment for a commercially proven design (*cf.* R. 335-37), a substitution evidently made to compensate for a serious, and undisclosed, error in the product yield calculations Lummus had supplied to Commonwealth (R. 552-54; also 534-35, 573-74; compare with R. 270-74, 53).

Commonwealth contends, and would establish in a court of law, that Lummus' actions in thus attempting to conceal its basic initial miscalculations are totally at odds with, *inter alia*, even minimum standards of professional engineering and business integrity.

Instead of realizing over $11,000,000 a year of net income on the refineries, as represented by Lummus' precontract calculations, Commonwealth sustained over $14,000,000 of operating losses in the three years 1956 through 1958 (R. 424-25).

Commonwealth has paid Lummus $32,480,526 for the refineries delivered to it (R. 425-26, 456). In addition, Commonwealth has been forced to borrow and spend $10,600,000 on a major construction program to correct, improve and enlarge the refineries sufficiently to put them in an economically operable condition (R. 426). Commonwealth has long refused to pay the $4,697,997.85 that Lummus claims is due, publicly and repeatedly asserting, as it still asserts, that Lummus owes Commonwealth more on Commonwealth's claim that Lummus claims, or could claim, for its work (R. 130).

parties, and Judge Dawson, therefore, directed trial of these further issues. These matters had not been presented in Puerto Rico.

The First Circuit reversed the order of the Puerto Rican District Court. The grounds will be further described herein, but the central determination was that Commonwealth's complaint, filed in Puerto Rico, was insufficient to support a cause of action for rescission under which the fraud issue could be tendered for decision.

In a materially different procedural context, the Second Circuit, by writ of mandamus, has proscribed the trial of the fraud issue later ordered on independent consideration by the District Court for the Southern District of New York. The Second Circuit acted on the theory that the decision of the First Circuit, though rendered on an interlocutory appeal, had the effect of "conclusiveness" or "finality" in the proceedings in the Southern District; it went on to determine the issues as to the scope of the arbitration clause.

Proceedings commenced April 29, 1959, when Lummus mailed to Commonwealth a demand for arbitration in New York, purportedly pursuant to the arbitration clauses of the contracts (R. 109-10, 130-31).

On May 4, 1959, five days after the demand for arbitration was mailed, Commonwealth filed a complaint against Lummus in the United States District Court for the District of Puerto Rico (R. 111-16, 131). Commonwealth claimed (a) damages and such rescission of the contracts under the laws of the State of New York as was equitable, or (b) a declaration of

the non-existence of the contracts under the laws of Puerto Rico, alleging fraud in the inducement of the contracts (R. 114-15). At the same time, Commonwealth moved for an order staying the arbitration demanded and for a preliminary injunction restraining Lummus from taking any steps in furtherance of the arbitration (R. 117).

Some two weeks later, Lummus petitioned the New York Supreme Court, New York County, for an order to compel Commonwealth to arbitrate (R. 6-9). Commonwealth removed these proceedings to the United States District Court for the Southern District of New York, the basis of jurisdiction being 28 U.S.C. §§ 1332, 1441(a). (R. 1-3, 659-74)

Thereafter, Commonwealth's motion to stay arbitration and to enjoin Lummus from proceeding in New York came on in the Puerto Rican District Court. After extensive argument and consideration of facts submitted by affidavit, the District Court found that Commonwealth had made out a *prima facie* case of false representations, of justifiable reliance thereon, and fraudulent (or reckless) intent (R. 518, 520; S.A. 24, 27).

By its order the Puerto Rican District Court (a) fixed Lummus' time to join issue by answer to Commonwealth's complaint, (b) directed trial of the issues thus joined, including the issue of fraud in the inducement, and (c) stayed the arbitration demanded and enjoined Lummus from taking further proceedings in the Southern District of New York or in the arbitration until the Puerto Rican District Court determined by trial whether there were existing and valid arbitration agreements (R. 522-24; S.A. 30-31).

This order, strictly interlocutory, had as its main point provision for a trial of the fraud issue, and was appealable only because it incidentally granted injunctive relief, pending the trial, against Lummus' New York proceedings to compel arbitration.

Lummus did appeal to the First Circuit pursuant to 28 U.S.C. § 1292(a)(1), which provides for appeals from "Interlocutory Orders" granting injunctions.

On appeal the First Circuit reversed (280 F.2d 915 (1960); R. 473-503; S.A. 33-67).

The First Circuit decided that the District Court's preliminary findings that Commonwealth had made out a *prima facie* case of false representations, justifiable reliance thereon, and fraudulent (or reckless) intent were not reversible (R. 484-85; S.A. 46-47). However, it held that the applicable law was the law of New York (R. 487-88; S.A. 50-51), and that, because Commonwealth's complaint seeking rescission was not coupled with an intent to return the consideration — here the vast refineries in Puerto Rico — and did not assert any fraud peculiar to the arbitration clause, that complaint could not support a trial of the fraud issue raised (R. 493-97; S.A. 56-61). The First Circuit held, moreover, that Commonwealth could not maintain its action for rescission because it had not shown, in explanation of its apparently late assertion of fraud and of a right to rescind, that it had only recently discovered the fraud complained of (R. 497-99; S.A. 61-63).

On rehearing, Commonwealth tendered affidavits showing the very recent discovery of the evidence of fraud (R. 533-74), but the First Circuit stated that

having "devoted a sizable portion of the past several months to the complexities of this unusually difficult case", it had no desire to consider a new record at that stage if not shown that it had erred on the record before it (R. 506; S.A. 70-71). The Court of Appeals then said:

> "We intimated at the beginning of our opinion that there would have been sound reasons for the Court below to have deferred initially to the New York court. . . . Under the terms of the arbitration agreement arbitration will take place in New York. New York law will be controlling. We think that a court in New York should supervise the arbitration." (R. 507-08; S.A. 72)

After this Court had denied a petition for a writ of certiorari (364 U.S. 911 (1960)), the mandate of the First Circuit issued advising the Puerto Rican District Court to stay its own proceedings and ultimately to dismiss its proceedings if all issues were disposed of in New York by arbitration or otherwise (R. 598). The District Court thereupon entered an order on mandate, dated January 3, 1961, vacating its earlier order and staying all proceedings in the action brought in Puerto Rico

> ". . . until the entry of a final judgment or order by a Court of competent jurisdiction in the State of New York determining the issues of the arbitrability of the claims between the parties. . . ." (R. 526)

Thus, no final order was, or has yet been, entered in the Puerto Rican District Court.

With the focus of the litigation effectively moved to the Southern District of New York, where Lummus' petition to compel arbitration was pending (R.

724). Lummus sought to cause the American Arbitration Association to proceed with the arbitration demanded before the petition to compel arbitration was brought on for hearing in the District Court (R. 614-28, 631-46).* The Association directed that a list for the selection of arbitrators be returned by January 19, 1961.

On January 10, 1961, Commonwealth filed its answer to the petition to compel arbitration (R. 435-44). By way of defense to the petition, Commonwealth sought to establish in the Southern District that there were substantial issues as to whether it had consented to such arbitration and as to the scope of the arbitration clause. On January 18, 1961, Commonwealth moved by order to show cause, signed by The Honorable David N. Edelstein, District Judge, to bring on an immediate trial of the issues raised by its answer to the petition (R. 446-48). A stay of the arbitration proceedings was thereafter ordered by The Honorable Frederick V. P. Bryan, District Judge, pending determination of Commonwealth's motion (R. 651-56).

Commonwealth's motion came on before Judge Dawson. The issues proposed to be tried were fraud in the inducement of the contracts, a contention that certain of Lummus' claims did not, in any event, arise under the contracts, and the effect of a provision

* The American Arbitration Association by letter dated January 12, 1961 acceded to Lummus' request that it proceed without waiting for the District Court to consider the petition, stating that:

> ". . . the Association will not require that a motion to compel arbitration be made as a prerequisite to our administration and the Association will proceed with the administration of the arbitration in the absence of an agreement between the parties to the contrary or an order of the Court staying the arbitration." (R. 648)

of the arbitration paragraph exempting from arbitration claims covered by insurance.

On June 7, 1961, Judge Dawson, after considering all the evidence before him, including the evidence the First Circuit had declined to receive on rehearing, granted Commonwealth's motion for a trial of these issues. Judge Dawson found that it was "abundantly clear" that a substantial issue had been raised as to the making of the contracts. He observed that

> "If this action were still in the State court, under Section 1450 [New York Civil Practice Act], the Supreme Court judge considering the petition would set the action down for an immediate trial." (R. 682; S.A. 82)

By order dated June 22, 1961, Judge Dawson directed

> ". . . a trial of the issues concerning the making of the contracts of July 8, 1954 and March 14, 1956, and the arbitrability of the issues in conflict between the parties, . . . and staying all proceedings in connection with the arbitration demanded by the Demand for Arbitration of [Lummus] . . . pending determination of the said trial. . . ." (R. 748; S.A. 84)

Judge Dawson thereafter denied a motion of Lummus for reargument or, alternatively, for a certificate pursuant to 28 U.S.C. § 1292(b). (R. 742-45)

Lummus thereupon appealed to the Second Circuit from Judge Dawson's order (R. 749-50); Commonwealth moved to dismiss for lack of appellate jurisdiction (R. 758-59); and Lummus petitioned for issuance of a writ of mandamus in the event Commonwealth's motion to dismiss the appeal were granted (R. 756).

The appeal was duly dismissed, the Second Circuit stating that "Plainly Judge Dawson's order is not a final judgment appealable under 28 U.S.C. § 1291", and holding that the order was neither the grant nor the refusal of an interlocutory injunction within § 1292(a)(1). (R. 994-98; S.A. 93-97)

The Second Circuit granted, however, Lummus' petition for mandamus. The Court acknowledged that the extraordinary power to issue a writ of mandamus should be exercised "only in exceptional circumstances" since to do otherwise would frustrate the basic federal policy against piecemeal appeals, citing *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and that "delay of arbitration through direction of a possibly needless trial of arbitrability *in limine* would not normally suffice to warrant the issuance of mandamus", citing *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir. 1961). (R. 998; S.A. 98)

The Second Circuit held that the required "exceptional circumstances" existed in the present case because the decision of the First Circuit, though admittedly not a "final judgment" under 28 U.S.C. § 1291, and rendered without considering the evidence later before Judge Dawson, should have been given "conclusive" effect, or the effect of "finality", in the Southern District of New York with respect to the issue of fraud in the inducement (R. 998-99, 1000-05; S.A. 97-98, 100-05). The Second Circuit granted that

> "'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." (R. 1004; S.A. 104)

On this theory, and although recognizing the discretionary element inherent in its definition of "finality", the Second Circuit granted mandamus to prohibit trial of the issue of fraud in the inducement, and specifically equated the "right" of Lummus "not to have to relitigate an issue so determined" to the "right to jury trial", the "right to trial before an unbiased judge", and the "right to trial directly by a judge rather than initially by a master." (R. 998-99; S.A. 98)

With respect to the issue raised by Commonwealth's contention that certain of Lummus' claims did not, in any event, arise under the arbitration clauses, and its further contention that the intent and effect of the insurance exception provided for therein was to exempt from arbitration certain additional claims in dispute, the Second Circuit acknowledged that the First Circuit's decision was not conclusive even under the broad view of "finality" adopted by the Second Circuit (R. 1000; S.A. 100). It nevertheless went on to direct, by mandamus, that the District Court could not try those issues, holding that any decision in favor of the contentions of Commonwealth with respect to those issues would be reversed on appeal when such decision ultimately became reviewable (R. 1005; S.A. 106).

We respectfully except to these determinations and suggest that the Second Circuit has improperly enlarged the scope of the extraordinary remedy of mandamus; has unwarrantably extended conclusive effect to decisions of federal courts rendered upon interlocutory appeals; has assumed powers under the extraordinary writ exceeding those available even on interlocutory and final appeals, to decide issues and to direct the future course of the litigation; and has

transgressed the requirements of due process by ordering an arbitration of a dispute where there is a substantial issue, unresolved, as to whether a party has consented to such arbitration.

REASONS FOR GRANTING THE WRIT

POINT I

By directing its writ of mandamus against Judge Dawson in the circumstances here presented, the Second Circuit has unwarrantably extended the scope of mandamus beyond the limits established by this Court in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and in other decisions.

The present judgment of the Second Circuit represents the first attempted exercise of the extraordinary power of mandamus, by any federal court, to reverse the decision of a District Judge on the ground that his decision, though ultimately reviewable on appeal, failed to give "conclusive" effect, or the effect of "finality" to a prior determination by a federal court of another Circuit.*

The Second Circuit would, moreover, direct by mandamus that conclusive effect be given here, where the prior decision was rendered on an interlocutory appeal. The court finds it enough to justify issuance of the writ that the interlocutory decision was not intended to be "tentative" and that an adequate hearing and opportunity for review were provided. Thus

* In *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940), discussed under Point II, *infra*, pp. 23-24, this Court held that the mandamus power could not be exercised where a District Judge's order remanding an action to the State courts of Ohio rested on a failure to give *res judicata* effect to the prior determination of the State's highest court with respect to the critical issue.

the Second Circuit concedes that "finality", in this context, "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again" (R. 1004; S.A. 104).

If allowed to stand by this Court, this precedent bids fair to distort beyond recognition the classic principle that mandamus "is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power'" (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953), cited with approval in *La Buy*, 352 U.S. at 257), and to make serious inroads into the established statutory policy against piecemeal appeals.

The Second Circuit acknowledges that mandamus should be used only in "exceptional circumstances", under *La Buy*, and that to do otherwise would frustrate the basic federal appeal policy. It recognizes that the possibility that a District Court's order may lead to "delay of arbitration through direction of a possibly needless trial of arbitrability *in limine* would not normally suffice to warrant the issuance of mandamus", citing *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir. 1961).

Nonetheless it holds that Judge Dawson's failure to give the First Circuit's determination conclusive effect in the context of the New York proceedings constituted the "exceptional circumstances" required by *La Buy* for issuance of the writ, on the ground that:

> "The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), the right to trial before an unbiased judge, *United*

States v. *Ritter*, 273 F.2d 30, 32 (10 Cir. 1959), cert. denied, 362 U.S. 946, 950 (1960), *In re Union Leader Corp., supra*, or the right to trial directly by a judge rather than initially by a master, *La Buy* v. *Howes Leather Co., supra*." (R. 998-99; S.A. 98)

This holding, we respectfully suggest, constitutes serious and substantial error.

The cases permitting use of the writ of mandamus to enforce a petitioner's right to trial by jury, most recently followed by this Court in the *Beacon Theatres* case, constitute a specific and long-established exception, founded on the protection of this fundamental right of the litigant, to the statutory policy restricting interlocutory review. *Ex parte Simons*, 247 U.S. 231 (1918); *Ex parte Peterson*, 253 U.S. 300 (1920).

The *La Buy* case, contrary to the statement of the Second Circuit, involved the establishment of no general "right" of a litigant to issuance of the writ of mandamus to prevent reference to a master, but rather drew into question the administrative power of a Court of Appeals to enforce its reiterated views, flagrantly disregarded by a District Judge of its Circuit, as to the right to trial before a judge rather than reference to a master merely to ease a crowded docket.

The decision of Judge Dawson, even if in error in failing to apply the determination of the First Circuit, falls far short of the exceptional circumstances presented in these leading cases.*

* Paradoxically, to be compelled to undergo an arbitration to which there has been no valid consent would appear to lie much nearer the area of "exceptional circumstances" than does the situation which furnishes the basis for Lummus' petition for mandamus, granted by the Second Circuit. Even reference to a master leaves much broader scope for eventual assertion of the powers of a court than does submission to an arbitrator.

Faced with a petition to compel arbitration of certain disputes, and an answer denying valid consent to such arbitration, Judge Dawson took evidence in the form of affidavits to determine not whether there should or should not be arbitration, but only to determine whether there were substantial issues as to the validity of the alleged consent to arbitration, and as to the scope of the arbitration clause, which should first be tried. In this context he applied New York law, as had the First Circuit, found on the evidence that it was "abundantly clear" that a substantial issue as to the making of the contracts had been raised, determined that a New York "Supreme Court judge considering the petition would set the action down for an immediate trial" (R. 682; S.A. 82), and directed that a trial of the consent and arbitrability issues be held before the District Court on October 16, 1961. It may be said that, inferentially, Judge Dawson determined there was "really good reason" to determine these issues.*

To elevate an assumed error of law by Judge Dawson, in holding as he did, to the level of the "exceptional circumstances" or the "clear abuse of discretion or usurpation of judicial power" which would justify issuance of mandamus to reverse him, is to shrink

* The appropriateness of normal review practice in the case at bar is emphasized by the fact that Judge Dawson's order of June 22, 1961, with respect to which mandamus was granted by the Second Circuit on November 14, 1961, set down the District Court trial at the head of the Ready Day Calendar for October 5, 1961. As the Second Circuit conceded in its opinion, whether the result of this trial had been "an order dismissing Lummus' petition or an order directing arbitration", that order would have been appealable as a final judgment under 28 U.S.C. § 1291 (R. 994; S.A. 93). While it is too late now to achieve what might have been, the present decision of the Second Circuit should not be permitted to stand as a precedent encouraging premature appellate proceedings in other cases to come.

those concepts to the point where the mandamus power assumes the aspect of a general power to review interlocutory orders of District Courts.

The impropriety of the Second Circuit's attempted extension of *La Buy* and *Beacon Theatres* to the present circumstances is confirmed by numerous decisions of this Court holding that mandamus would not lie to permit appellate intervention by interlocutory review in cases which had been ordered to trial by a District Judge after refusal of some notionally possible summary disposition involving principles no more discretionary than those allegedly at stake here. See *Parr* v. *United States*, 351 U. S. 513 (1956); *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 (1953); *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943); *Ex parte Chicago, R. I. & Pac. Ry.*, 255 U. S. 273 (1921); *Ex parte Park Square Automobile Station*, 244 U. S. 412 (1917); *Ex parte Roe*, 234 U. S. 70 (1914); *Ex parte Harding*, 219 U. S. 363 (1911); and *Ex parte Hoard*, 105 U. S. 578 (1882).

The need for immediate guidance by this Court, and a determination whether the standards expressed in the present decision of the Second Circuit are to stand as precedent, is further shown by the divergence of those standards from standards applied by other Courts of Appeal.

Thus the Third Circuit has held mandamus inappropriate to correct the possibly too broad effect given by a District Court to the decision of another District Court in another action between the parties, *Gulf Research & Development Co.* v. *Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd by an equally divided Court on other issues*, 344 U. S. 861 (1952); and has indicated in a post-*La Buy* decision that this holding would be given

substantial weight if the converse question—of giving too little effect to such a decision—were to arise. *TCF Film Corp.* v. *Gourley*, 240 F.2d 711, 714 & n.5 (3d Cir. 1957).

The standards applied in the present case are also in conflict with those acknowledged and applied in numerous other post-*La Buy* decisions of the Courts of Appeal, including *Hoffa* v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960); *Byram Concretanks, Inc.* v. *Meaney*, 286 F.2d 170 (3d Cir. 1961); *Green* v. *Murphy*, 259 F.2d 591 (3d Cir. 1958); *Smith's Transfer Corp.* v. *Barksdale*, 259 F.2d 498 (4th Cir. 1958); *Hotel Corp. of Cleveland* v. *United States Dist. Ct.*, 283 F.2d 470 (6th Cir. 1960); and *Boucke* v. *Weick*, 275 F.2d 38 (6th Cir. 1960). In each of these decisions the appellate court refusing the writ has carefully refrained from construing *La Buy* in a manner inconsistent with the previous decisions of this Court on the subject of mandamus. If the present decision is correct, however, *La Buy* signifies far more than these other Circuits have thus far conceded.

The effect wrought by the present decision on the balance between the powers of the Circuit and District Courts to control the initial stages of federal court litigation must also be viewed against the recent enactment of 28 U.S.C. § 1292(b). By this section, Congress made specific provision for allowance of appeals, in the discretion of the District Judge, from orders not otherwise appealable where the orders involved a "controlling question of law" the immediate resolution of which might materially advance the litigation. This enactment should be viewed as narrowing, rather than enlarging, the scope of mandamus, in circumstances such as those of the case at bar, where Lummus sought a certificate permitting appeal

under this section and its application was denied by the District Court. *Cf.* 75 HARV. L. REV. 351, 381-82 (1961). Mandamus, in the present circumstances, effectively undermines the District Court's exercise of discretion under § 1292(b) in making this ruling.*

POINT II

The Second Circuit, in holding that the interlocutory decision of the First Circuit had conclusive effect in the proceedings in the Southern District of New York, has taken a position inconsistent with the decisions of this Court in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), and *Kloeb* v. *Armour & Co.*, 311 U.S. 199 (1940), and in conflict with decisions of other Courts of Appeal.

The Second Circuit concedes that the decision of the First Circuit was not "final" in the sense of 28 U.S.C. § 1291, but nevertheless holds that it ought to be so considered for the purpose of precluding Judge Dawson from weighing the evidence before him and determining whether Commonwealth had raised a substantial issue of fraud in the inducement.

Justifying its wide departure from the appeal concept of "finality" under § 1291, heretofore controlling in the federal law of judgments, the Second Circuit cites the contrary practice in several States (R. 1003; S.A. 103-04), and substitutes for the § 1291 standard a highly discretionary rule in which finality "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really

* Lummus pressed no argument for mandamus upon the Second Circuit which was not advanced to Judge Dawson as a reason for granting certification.

good reason for permitting it to be litigated again." The broad guidelines for applying this new principle are said to be whether the earlier decision, now to be considered final, is thought by a second court to have been regarded as "not avowedly tentative" by the court rendering it, and whether there was an adequate hearing and an opportunity for review.

This new departure in the federal law of finality of judgments is at odds with the rule of this Court.

In the *Hoffman* case, the District Court for the Northern District of Texas had granted defendants' motion to transfer an action to the Northern District of Illinois on grounds of *forum non conveniens*, over plaintiffs' objection that transfer to the Illinois court was improper because the courts of that district lacked venue over the action and ability to command jurisdiction over the defendants. The Fifth Circuit declined to issue a writ of mandamus to vacate the order of transfer. The plaintiffs thereupon moved in the Illinois District Court, on the same grounds, for an order remanding the action to Texas. The motion for remand was denied. The Seventh Circuit, on petition for mandamus, granted the writ and directed the Illinois District Court to remand the case to Texas. This Court affirmed, holding that the Seventh Circuit had acted properly in granting the writ.*

The question of the effect in the Seventh Circuit of the prior Fifth Circuit decision was specifically considered by this Court. The dissenting opinion observed that the Fifth Circuit had "fully examined the merits" of plaintiffs' claim that the action could not properly be transferred to Illinois, and had re-

* The majority opinion noted that the parties had not raised the question of the propriety of the remedy of mandamus (363 U.S. at 340).

jected that claim (363 U.S. at 346). The dissent urged that "all the considerations bearing on the good administration of justice which underlie the technical doctrine of *res judicata*" should have been applied to preclude relitigation of the claim by the Illinois District Court and by the Seventh Circuit (*id.* at 348). This minority view is essentially the view the Second Circuit would now adopt and apply in the case at bar.

The majority of this Court reached the contrary conclusion. Expressly rejecting the *res judicata* argument of the dissent, the Court declared that "principles of *res judicata* do not apply" where the orders involved

> ". . . were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction" (*id.* at 340n.9).

In *Kloeb* v. *Armour & Co.*, *supra*, the Ohio state courts had granted a petition to remove a cause to the federal courts on a determination by the Supreme Court of Ohio that, under Ohio law, that cause was separable from an action against another tortfeasor in which diversity was absent. The District Court remanded the case to the state courts pursuant to 28 U.S.C. §§ 71 and 80 (now §§ 1447(c), (d) and 1359). The Sixth Circuit applied the *res judicata* principles here espoused by the Second Circuit, and granted mandamus on the ground that the District Court's determination of the issue of separability was in excess of its authority since that very issue, upon which the remand turned, had been previously adjudicated by the Supreme Court of Ohio.

On certiorari, this Court reversed and held that the District Court had not exceeded its powers by determining the question anew, pointing out the further

circumstance (also present in the case at bar) that additional facts had been placed before the District Judge and could properly be considered by him.

The three factors invoked by the Second Circuit here to justify its finding of conclusiveness were present to at least the same extent in *Hoffman* and *Kloeb*. The decisions of the Fifth Circuit and of the Supreme Court of Ohio were no more "tentative" than the decision of the First Circuit in the case at bar, nor were the opportunities for hearing or review afforded in the *Hoffman* and *Kloeb* proceedings any less.

See also *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) ("We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*.")

The Seventh and Eighth Circuits have clearly expressed adherence to a rule the contrary of that adopted here by the Second Circuit. See *Hunter* v. *Atchison, T. & S.F. Ry.*, 193 F. 2d 294, 298-99 (7th Cir. 1951); *Doeskin Products Inc.* v. *United Paper Co.*, 195 F. 2d 356, 360-61 (7th Cir. 1952); *Benson Hotel Corp.* v. *Woods*, 168 F. 2d 694, 697-98 (8th Cir. 1948); *Missouri-Kansas-Texas R.R.* v. *Randolph*, 182 F. 2d 996, 999-1000 (8th Cir. 1950); and *Chicago Great Western Ry.* v. *Chicago, Burlington & Quincy Ry.*, 193 F. 2d 975, 978-79 (8th Cir. 1952).

The Third Circuit has also regarded as well-settled to the contrary the "finality" or *res judicata* principles which the Second Circuit would now impose upon the discretion of federal trial judges. In *De Forest Radio Telephone & Telegraph Co.* v. *Westinghouse Elec. & Mfg. Co.*, 13 F. 2d 1014 (E.D. Pa. 1924), *aff'd*, 21 F. 2d 918 (3d Cir. 1927), *aff'd per curiam*, 278 U.S.

562 (1928), the Third Circuit noted (21 F. 2d at 324) that an argument was no longer being pressed that an interlocutory order of the Second Circuit, on the question of priority of invention, was *res judicata* as to the issues in the Third Circuit, having been rejected by the District Court (13 F. 2d at 1016). The Third Circuit cited on the point, as had the District Court, this Court's decision in *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82 (1922) ("If it [the decree] be only interlocutory, the court at any time before final decree may modify or rescind it." 258 U.S. at 88).

The essence of the rule thus far followed in the federal courts is that a prior determination of an issue by another court in related proceedings, where interlocutory, and not on the merits, will not preclude a District Judge from determining the same issue. *A fortiori*, a District Judge's independent determination of the issue, contrary though it may be to the prior decision, cannot constitute an abuse of power sufficient to justify appellate correction by mandamus.

POINT III

Judge Dawson's order of June 22, 1961, directed trial not only of the issue of fraud in the inducement, but also of issues as to whether certain of Lummus' claims were within the scope of the arbitration clause, and as to the effect to be given the insurance exception in the last sentence of the clause.

The Second Circuit acknowledged that these issues, like the fraud issue, were not presently appealable, and acknowledged, moreover, that they had not been "conclusively" determined by the First Circuit, even under the broad view of "finality" declared herein

by the Second Circuit. The Second Circuit, nevertheless, granted mandamus to foreclose the District Court from trying those issues on the ground that a decision in favor of such claims would be reversed by the Second Circuit when such decision ultimately became reviewable.

All we have said under Point I hereof, with respect to the proper scope of mandamus, applies here as well. But here, in addition, with "conclusiveness" disclaimed as to these issues, there is not even a semblance of the showing of "exceptional circumstances" required to justify the use of the extraordinary writ to reverse the District Court's determination that there be a trial of these issues.

The Second Circuit, in using the writ to review Judge Dawson's otherwise unappealable order, has assumed broad ancillary powers to direct the future course of litigation in direct conflict with the established federal policy against piecemeal appeals and favoring the administration by District Courts of cases brought before them.

The Second Circuit's extension of the bounds of appellate jurisdiction, under color of the mandamus power, goes beyond even the jurisdiction asserted on appeals taken in normal course. The Second Circuit in fact assumed the function of a trial court with respect to these issues and determined them on the merits. In so doing, at least in the case of the insurance exception, the court did not simply view the contract as clear and unambiguous and thus susceptible of judicial determination as a matter of interpretation of the instrument. It in fact considered and relied upon extrinsic evidence presented in affidavits which had been submitted to the District Court for the sole

purpose of establishing whether substantial issues were in dispute between the parties and should be tried.

For example, the court relied heavily on a memorandum of Marsh & McLennan, insurance brokers, to discover the purpose of the inclusion of the insurance exception in the arbitration clause, and its intended application (R. 1009-10; S.A. 110-11), and upon an affidavit submitted by Lummus purporting to disclaim that it has insurance protection of the kind contemplated by the exception (R. 1010; S.A. 111-12). Commonwealth had no opportunity to present evidence to rebut the inferences drawn by the Second Circuit from the memorandum, nor any opportunity to cross-examine the affiant or engage in discovery of Lummus' files to determine the accuracy of the statement.

Again, paradoxically, the deprivation by the Second Circuit of Commonwealth's right to trial of disputed issues, with the concomitant benefits of discovery, cross-examination, and full presentation of relevant evidence, is far more demanding of protection than the circumstances herein considered "exceptional" by the Second Circuit.

The decision of the Second Circuit should not be allowed to stand as a precedent for the use of the extraordinary writs to review and determine, without trial, disputed issues found to be substantial by District Courts. The use of mandamus to prevent a prospectively erroneous decision upon the trial of such issues is in conflict with the prevailing rule. See *Ex parte Wagner*, 249 U.S. 465 (1919); *Hoffa* v. *Letts*, 282 F. 2d 842 (D.C. Cir. 1960).

POINT IV

By granting mandamus to prohibit judicial determination of Commonwealth's assertion of non-consent as a defense to respondent's petition to compel arbitration, the Second Circuit has ordered compulsory arbitration, violative of the guarantees of the Fifth and Fourteenth Amendments as applied by this Court in *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), and *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923).*

The Second Circuit's holding that the First Circuit's decision had conclusive effect to foreclose Judge Dawson's consideration of the fraud charged by Commonwealth, ignores the critical difference in the procedural contexts within which the decisions of the First Circuit and of the Southern District were rendered.

The First Circuit was confronted with Commonwealth's complaint framed in rescission and with the Puerto Rican District Court's order directing trial of the issues thus raised. The First Circuit held that the complaint was insufficient to support a trial of

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* The Second Circuit equivocated as to whether it was accepting and applying the determination of the First Circuit that the applicable law was the New York arbitration statute, or was applying the United States Arbitration Act, stating that "we here perceive no significant difference between the two" (R. 1001 & n.7; S.A. 101 & n.7).

Therefore it is not clear whether the present holding should be considered to be in conflict with the Fifth or Fourteenth Amendment. This does not appear crucial for the purpose of the constitutional argument, since that argument is based on decisions which relate to state compulsory arbitration statutes and hold them contrary to the Fourteenth Amendment. These would apply, probably *a fortiori*, or at least with equal force, to a federal statute or procedure exhibiting the same defects.

the fraud issue because of (a) the apparent unwillingness of Commonwealth to offer back the refineries which were the consideration for the contract to be rescinded, and (b) the absence of a showing of the late discovery of the fraud alleged. The First Circuit expressly refrained from overturning the District Court's holding that a "substantial showing of fraud in the inducement had been made out, stating it was "short of willing to reverse the lower court's preliminary findings" on that issue (R. 485; S.A. 47).

In the Southern District, Judge Dawson had before him Lummus' petition to compel arbitration and Commonwealth's answer to the petition, denying consent to the arbitration demanded. There was no question of a Commonwealth complaint, or its sufficiency. None had been filed, or has yet been filed in the Southern District.

In ruling that the First Circuit determination is conclusive on the issue raised by Commonwealth's defense of non-consent, the Second Circuit deprives Commonwealth of a judicial determination of that defense and, in effect, compels Commonwealth to arbitrate. The compulsory arbitration thus ordered contravenes the standards set forth in the *Dorchy* and *Wolff* decisions, both of which held compulsory arbitration required by a Kansas statute to violate the due process clause of the Fourteenth Amendment. These decisions retain their full vigor. See *United Steelworkers of America* v. *United States*, 361 U.S. 39, 74-75 (1959) (dissenting opinion); *Application of Smith*, 381 Pa. 223, 112 A. 2d 625, 629 (1955).

The constitutionality of a deprivation of property through an award following arbitral proceedings must depend on the validity of a party's consent to such

proceedings; and arbitrators, applying procedures in themselves not constitutionally adequate, may not properly determine the threshold question of consent, where a substantial issue as to the fraudulent inducement of that consent has been raised. But see *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed on stipulation*, 364 U.S. 801 (1960).*

The classic formulation of the right to a judicial determination of the issue of consent was enunciated by Chief Judge Cardozo, writing for the New York Court of Appeals in *Finsilver, Still & Moss v. Goldberg, Maas & Co.*, 253 N.Y. 382, 389-92, 171 N.E. 579, 581-82 (1930), and remains fully expressive of the law:

> "Arbitration presupposes the existence of a contract to arbitrate. If a party to a controversy denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at some stage for the determination of the issue. The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award, is assured by the Constitution as part of its assurance of due process of law. * * * * Nothing in the [New York] statute denies to one so situated the right to participate in the arbitration, and still contest the jurisdiction.

* In the present case, the Second Circuit made it clear that it regarded these issues as remaining open to the arbitrators:

> "We add for clarity that we do not hold any determination by the First Circuit with respect to fraud, rescission, etc. to be conclusive save on the limited issue of arbitrability." (R. 1005 n.8; S.A. 105 n.8)

> On the contrary, the section opens with the declaration that the award shall be valid, though made without previous application to the court, in those cases and in those only where the arbitration is 'pursuant to' the provisions of a contract. If it is not pursuant to a contract, if in truth there is no contract at all or none calling for arbitration, the self-constituted tribunal is a nullity, without power to bind or loose by force of its decision. . . . In the absence of a contract expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation. Nowhere does the statute say that its quality shall be different. As an act of usurpation, it is subject to be challenged whenever and wherever it is put forward by the usurper as a source of rights and duties. Till there is an adjudication of its validity by a competent judicial officer, as for example upon motion after due notice to confirm or to vacate it, the issue of jurisdiction is open at the instance and for the benefit of any litigant aggrieved."

The present decision of the Second Circuit falls far short of the common sense and fundamental fairness of this approach. The Second Circuit's direction that conclusive effect be given the First Circuit's decision, forecloses Commonwealth from a trial of its defense of non-consent because it failed to meet the Spartan condition for rescission imposed by the First Circuit:

> ". . . . Commonwealth has no wish to make restoration and go out of business. But if a party that has acquired a business wishes rescission, this is exactly what it must do." (R. 496; S.A. 59)

Such rigorous conditions and harsh consequences may still attach to affirmative pleading in rescission,

as the First Circuit held.* They cannot, however, with constitutional propriety, be imposed to bar a litigant from defending against a claim that he has consented to waive his right to judicial determination of claims against him, and has submitted instead to arbitration. *Cf. Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 594 (1926).**

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* The Second Circuit has held under New York Civil Practice Act § 112-g, that no such rigors apply even to a complaint in rescission. See *Ciletti* v. *Union Pac. Ry.*, 196 F.2d 50, 52 (2d Cir. 1952).

** In the *Devonshire* case, *supra* the Second Circuit held that the United States Arbitration Act would govern questions as to the validity and interpretation of arbitration clauses in contracts in interstate commerce, and that under that Act a general allegation of fraud in the inducement of the contract, not relating specifically to the inducement of the arbitration clause, could not prevent arbitration of the fraud issue.

The constitutional issue here presented would not be reached if, in line with the *Devonshire* decision, this Court were to hold the federal Arbitration Act applicable, but contrary to that decision, were not to construe the Act to require arbitration of the fraud in the inducement question. If this disposition is considered possible, it is respectfully suggested that the parties are in a posture to brief the subsidiary question of the applicability of the Act were this Court to grant this petition and express its desire for such a presentation.

CONCLUSION

It is therefore respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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December 22, 1961

Statutes Involved

All Writs Act, 28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(a)(1)

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C. § 1292(b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

ARBITRATION CLAUSE

25.1 Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association. This Agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in New York, U.S.A. It is agreed, however, that this Agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests.

No. 625

Office-Supreme Court, U.S.
FILED
DEC 22 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

—against—

THE LUMMUS COMPANY,

Respondent.

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

PAGE

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959 1

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz-Nazario, J.) on July 20, 1959 ... 14

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960 33

Opinion of Court of Appeals for the First Circuit on Petition for Rehearing (Aldrich, J.), Filed August 10, 1960 68

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961 73

Order of District Court for the Southern District of New York Directing a Trial of Issues Involved (Dawson, J.), Dated June 22, 1961.. 83

Opinion of Court of Appeals for the Second Circuit (Friendly, J.), Dated November 14, 1961 86

Judgment (Appealability) of Court of Appeals for the Second Circuit, Entered November 14, 1961 115

Judgment (Mandamus) of Court of Appeals for the Second Circuit, Entered November 14, 1961 117

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Civil No. 94–59

COMMONWEALTH OIL REFINING COMPANY, INC.,

Plaintiff,

vs.

THE LUMMUS COMPANY,

Defendant.

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion, dated June 17, 1959, for a temporary injunction and the Court having considered the complaint, the motion of plaintiff dated May 4, 1959 to stay the arbitration demanded by defendant, the temporary restraining order herein dated May 29, 1959, the order extending said temporary restraining order dated June 1, 1959, the motion of defendant filed June 1, 1959 to vacate the restraining order and for other relief, plaintiff's motion for a temporary injunction made June 1, 1959 and heard June 5, 1959, and all of the affidavits and exhibits filed herein to date and having considered all memoranda of law filed by counsel, the transcript of the hearings on June 1 and June 5, 1959, and oral

argument of counsel in support of and in opposition to the said motion dated June 17, 1959, for temporary injunction in open court, the court makes the following:

Findings of Fact

1. The plaintiff Commonwealth Oil Refining Company, Inc., (hereinafter called Commonwealth) is a corporation organized and existing under the Laws of the Commonwealth of Puerto Rico, with its principal place of business in Ponce, Puerto Rico. It is also qualified to do business, and has an office, in the State of New York.

2. The defendant The Lummus Company (hereinafter called Lummus) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. The complaint alleges that Lummus is doing business in Puerto Rico, and Commonwealth has introduced exhibits which show that Lummus does business in Puerto Rico. On the other hand, Lummus has introduced an exhibit tending to prove that it is not qualified to do business in Puerto Rico, and its counsel have suggested that it does not do business within this district, although no motion or other pleading challenging the jurisdiction of this court has been filed. On the evidence now before the court, and for the purposes of this motion only, the court finds that Lummus is doing business in Puerto Rico.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

3. The parties signed a contract dated July 8, 1954, under the terms of which Lummus was to build, and Commonwealth was to buy for an agreed maximum cost of $19,000,000, an oil refinery on the Bahia de Guayanilla approximately 12 miles west of the city of Ponce, Puerto Rico.

4. The parties signed a further contract dated March 14, 1956, before the construction under the contract of July 8, 1954 was completed, providing for the expansion of Commonwealth's said oil refinery by the construction by Lummus of new facilities there, at an agreed maximum price of $15,985,400.

5. Each of the contracts referred to in paragraphs 3 and 4 hereof contained the following relevant provisions:

> "25.1. Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association. This Agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in New York, U. S. A. It is agreed, however, that this Agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests.
>
> . . .

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

> "26.1. When this agreement is executed . . . it . . . shall be deemed to have been made, executed and delivered in New York, New York. . . ."

6. Claims by each party against the other have been asserted and have been accruing since 1956. Commonwealth has withheld payments under the contracts because of the claims it alleges against Lummus and because of challenges to the justness of certain items charged. The parties agreed to postpone litigation to avoid any inhibition of a public offering of securities by Commonwealth commencing in late December 1957. Now the following proceedings have been had:

(a) Lummus made demand dated April 27, 1959, on a form supplied by the Commercial Arbitration Tribunal of the American Arbitration Association, for an award in its favor against Commonwealth of $4,697,997.85 with interest in payment of its claims under the refinery construction contracts "and a determination of any set-offs or counterclaims against the undersigned which Commonwealth may assert". This demand was received by Commonwealth's New York counsel on April 30, 1959.

(b) The American Arbitration Association mailed a notice dated April 30, 1959, of this demand for arbitration, which was received at Commonwealth's offices in Ponce on May 4, 1959.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

(c) On May 4, 1959, the present action was commenced in this court by the filing of a complaint in two counts, both based on allegations that certain "studies and projections" prepared by Lummus for the Commonwealth refinery had been relied upon by Commonwealth and had induced Commonwealth to enter into the contracts described in paragraphs 3 and 4 supra, and that the representations in these "studies and projections" were in fact false. The first count alleged that Lummus made these representations either knowing them to be false or with reckless indifference as to their truth or falsity, and therefore demands damages in the sum of $60,000,000 and rescission or a declaration of nullity of the two contracts. The second count alleges that the representations were made negligently, and demands $60,000,000 as damages for harm proximately caused by this negligence.

(d) On May 4, 1959, Commonwealth also filed in this court a motion (in the present tort case) for an order "pursuant to 32 L. P. R. A. §3204(4) (a) . . . staying the arbitration demanded" by Lummus on the form of the American Arbitration Association.

(e) Commonwealth stipulated (on May 6, 1959), at the request of Lummus, to postpone the hearing on the stay from May 8 to May 29, 1959.

(f) Lummus made a motion dated May 19, 1959, in the Supreme Court of the State of New York, County of New York, based upon a contemporaneous petition

verified by its president, "for an order directing that arbitration proceed between The Lummus Company and Commonwealth Oil Refining Company, Inc., in accordance with the contracts between said companies dated July 8, 1954 and March 14, 1956, and for such other and further relief as may be just and proper". The petition for this relief alleged jurisdiction, the making and terms of the contracts, Lummus' performance thereof and Commonwealth's default, and that Commonwealth had begun the action in this court. The motion, petition, and accompanying exhibits were served on the Secretary of State of New York on May 20 and again on May 22 and received by Commonwealth on May 22. The motion was noticed for hearing on June 8, 1959.

(g) On May 25 Commonwealth removed the said action from the Supreme Court of New York to the United States District Court for the Southern District of New York. No motion to remand has yet been filed, but counsel for Lummus has repeatedly stated to this court that it intends to so move.

(h) The parties on May 26 stipulated to postpone the hearing on the stay requested in the present action in this court from May 29 to June 1, for their convenience and that of the court.

(i) On May 29 Lummus presented for signature by the federal court in New York an order (1) requiring Commonwealth to show cause on June 4 why it should not be enjoined from all further proceedings in Puerto Rico and (2) restraining Commonwealth from such

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

proceedings until the determination whether an injunction should be issued. That court signed the order, but accelerated the hearing to June 2 and struck out the clause restraining Commonwealth in the interim. Counsel for Lummus had, as a courtesy, notified counsel for Commonwealth that it intended to present this order to show cause.

(j) At 3:38 p.m. on the same day, without notice to counsel for Lummus, counsel for Commonwealth informed this court of the order to show cause filed in New York and moved for a temporary restraining order. This court, Hon. Clemente Ruiz-Nazario sitting, granted the motion and issued an *ex parte* order restraining Lummus from any further proceedings in the said action in the United States District Court for the Southern District of New York.

(k) On June 1, 1959, Judge Ruiz-Nazario heard the parties at length, and received a great bulk of exhibits. Lummus moved to vacate the temporary restraining order, and Commonwealth moved to continue it; the court ordered the temporary restraining order continued for another ten days, which expired at 3:38 p.m. on May 18, 1959.

(l) The hearing on the return of the order to show cause in the Southern District of New York has been adjourned from June 2 to June 9 then to June 12 and finally to June 23, because of the restraining order of this court.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

(m) On June 5, 1959, a further hearing on the question whether a preliminary injunction should be entered was held before Judge Ruiz-Nazario of this court. Eighty odd exhibits have been introduced, so thick that they almost fill a filing cabinet drawer, some 11 affidavits have been filed, to several of which numerous exhibits are attached, and 6 memoranda of law have been submitted. The transcript of the hearings on June 1 and June 5 is 102 pages long.

7. Judge Ruiz-Nazario is presently outside the District of Puerto Rico.

8. The "studies and projections" submitted by Lummus to Commonwealth contain detailed scientific representations concerning the productivity of the Commonwealth refinery and economic evaluations, including such predictions as the time that would be required to recoup certain investments.

9. Commonwealth can probably prove that these representations have in fact been proved to be false.

10. Commonwealth can introduce evidence that it relied upon these representations to its detriment.

11. Commonwealth can introduce evidence that it would not have entered into the given contract or perhaps any contract with Lummus but for these representations.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

12. Commonwealth can introduce evidence tending to prove that these representations were made knowing them to be untrue or not caring whether they were true, so as to prove that they were fraudulent.

13. Lummus, if unrestrained, will prosecute its motion for an injunction prohibiting Commonwealth from further proceedings in this court, thus interfering with the jurisdiction of this court to determine the questions raised by the motion and pleadings in the present case, including matters now argued and submitted for decision to Judge Ruiz-Nazario.

14. Lummus, if unrestrained, will prosecute its action in the courts of New York, seeking removal and or an order directing the parties to submit to arbitration in New York.

15. All issues presented to the New York court are raised in the present case and many if not all of them have already been argued before Judge Ruiz-Nazario. The issues Lummus seeks to present to the arbitration tribunal in New York can all be raised in the present case in this court and many of them are comprehended by the complaint in the present case.

16. Defense of the actions in the court and in the arbitration tribunal in New York while prosecuting the present case in this court will result in an additional burden of time, trouble, and expense to Com-

monwealth which is unnecessary and avoidable. Moreover, it will constitute a similar burden to Lummus and to the federal judicial system.

17. These duplicating litigations create a risk of an unseemly and damaging race of diligence and/or of inconsistent and incompatible decisions in the several tribunals.

18. No evidence has been introduced tending to show that any harm to Lummus other than that compensable by interest on its recovery will be risked or suffered because of an injunction of proceedings in New York for a period of less than two months. The suggestion of counsel for Lummus that Commonwealth is financially irresponsible is unsupported by the record.

Conclusions of Law

I. At least for the purposes of the present motion, this court has jurisdiction over the parties. This court has undoubted jurisdiction over the subject-matter.

II. The threatened multiplicity of litigation constitutes a danger of irreparable harm to Commonwealth which, together with Commonwealth's lack of any other adequate remedy, is sufficient to invoke the

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

jurisdiction of a court of equity and satisfy the requirements of F. R. C. P. 65.

III. This court therefore has the power, in its discretion, to enjoin the taking of any further steps or proceedings by Lumanus in the United States District Court for the Southern District of New York in order to prevent interference with the orderly determination by this court of matters which it now has under advisement, to avoid duplication of litigation, and to promote an orderly administration of justice in the settlement of the issues between these parties.

IV. On all the facts, and the showing made by the parties and their declared intentions, this court is warranted in exercising its discretion to grant the motion of Commonwealth filed June 17, 1959, for a preliminary injunction to endure until Judge Ruiz-Nazario decides the matters now submitted to him or for a reasonable time, whichever is shorter.

V. On all the facts, and the showing made by the parties and their declared intentions, and pursuant to F. R. C. P. 65(*c*), this court holds the amount of an adequate security for this injunction to be $15,000, and holds that a reasonable time for the injunction to expire is 12:00 midnight on July 20, 1959.

NOW, THEREFORE, the Court being duly advised believing in its discretion that relief should be granted to the plaintiff:

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That defendant, The Lummus Company, its agents, servants, employees, and attorneys, and all persons acting in concert with them or on their behalf are hereby enjoined and restrained from prosecuting or taking any further action in the case pending in the United States District Court for the Southern District of New York entitled "*In the Matter of the Arbitration of Certain Differences between The Lummus Company, Petitioner, and Commonwealth Oil Refining Company, Inc., Respondent,*" Civil Action No. 146-246, until this Court enters its decision on plaintiff's motion for stay of arbitration dated May 4, 1959, or plaintiff's motion for preliminary injunction filed June 1, 1959, or until 12:00 midnight July 20, 1959, whichever is earlier.

(2) That the security posted by the defendant in the sum of $5,000.00 and approved by the Clerk is hereby continued in full force and effect as security upon this injunction, and that plaintiff shall file further security in a form satisfactory to the Clerk in the amount of $10,000.00.

(3) That this Order for preliminary injunction be notified to the attorneys of record in this case for the plaintiff and for the defendant, and a copy of this Order sent by registered mail to The Lummus Company and to Messrs. Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York, its attorneys of record in the action pending in the United States

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Magruder, J., Sitting by Assignment) on June 19, 1959

District Court for the Southern District of New York entitled "*In the Matter of the Arbitration of Certain Differences between The Luminus Company, Petitioner, and Commonwealth Oil Refining Company, Inc., Respondent*, Civil Action No. 146-246," and to the American Arbitration Association, 477 Madison Avenue, New York 22, New York.

San Juan, Puerto Rico, 3:35 p.m., this nineteenth day of June, 1959.

(sgd) CALVERT MAGRUDER
Calvert Magruder
United States Circuit Judge
(retired)
(By Assignment)

Attest: a true copy of the Findings of Fact, Conclusions of Law and Decree.

The bond in the sum of $10,000.00 mentioned in the order to the satisfaction of the Clerk has been duly posted.

s MARY AGUAYO
Mary Aguayo
Clerk, U. S. District Court for P. R.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

No. Civ. 94–59

(Filed and entered July 20, 1959)

COMMONWEALTH OIL REFINING COMPANY, INC.,

Plaintiff,

vs.

THE LUMMUS COMPANY,

Defendant.

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard (1) on plaintiff's motion dated May 4, 1959, for an order staying the arbitration demanded by defendant, of which plaintiff received notices, by registered mail, on Thursday, April 30, and Friday, May 1, 1959, and restraining defendant from taking any steps in furtherance thereof; (2) on plaintiff's motion dated June 1, 1959, for an order enjoining defendant, its agents, servants, employees and attorneys from prosecuting or taking any further action in the case pending in the United States District Court for the Southern District of New York entitled "*In the Matter of the Arbitration of Certain Differences between The Lummus Company, Petitioner, and*

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz-Nazario, J.) on July 20, 1959

Commonwealth Oil Refining Company, Inc., Respondent," or from taking any steps in pursuance or furtherance of the arbitration demanded by defendant, referred to above, until the entry of an order on plaintiff's motion of May 4 finally determining the said motion for an order staying the arbitration demanded by defendant and restraining defendant from taking any steps in furtherance thereof; and for such other and further relief as is just in the premises; and upon the said motions and all of the affidavits and exhibits filed herein to date, and the previous proceedings herein and having considered the memoranda of law filed by counsel, and the transcripts of the hearings herein the Court makes the following:

Findings of Fact

1. The plaintiff Commonwealth Oil Refining Company, Inc. (hereinafter called "Commonwealth") is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its principal place of business in Ponce, Puerto Rico. It is also qualified to do business, and has an office, in the State of New York.

2. The defendant The Lummus Company (hereinafter called "Lummus") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. The complaint alleges that Lummus is doing business in Puerto Rico, and Commonwealth has introduced affidavits and exhibits which show the nature

and extent of the business done by Lummus in Puerto Rico. On the evidence now before the Court, the Court finds that:

(A) Lummus was duly authorized to do business in Puerto Rico on August 25, 1938, and continued to be so authorized until April 12, 1943; Lummus was again authorized to do business in Puerto Rico on July 20, 1956, and continued to be so authorized until February 19, 1957; its wholly-owned subsidiary, The Lummus Company of Puerto Rico, was authorized to do business in Puerto Rico on October 25, 1954, and continued to be so authorized until July 23, 1956; it was again authorized to do business in Puerto Rico on January 21, 1957, and is still so authorized.

(B) The contracts of July 8, 1954, and March 14, 1956, relied on by The Lummus Company provided by Sections 1.0 and 6.0 for the scope of the work of The Lummus Company and the duties of The Lummus Company in the furnishing of the design, the equipment, the construction and assistance in the initial operation of each of the refineries to be constructed at Bahia de Guayanilla, in Puerto Rico for Commonwealth. The aggregate guaranteed price for the refineries was in excess of $44,000,000.

(C) The said contracts provided that work done by any wholly-owned subsidiary of The Lummus Company, which would include The Lummus Company of Puerto Rico, would be considered "as having been performed by" The Lummus Company.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

(D) Senior and principal officers of defendant, The Lummus Company, have been frequent in their visits to Puerto Rico since 1954 in connection both with the Commonwealth jobs and apparently The González Chemical Company job at Guánica, Puerto Rico.

(E) Certain persons apparently associated with both The Lummus Companies acted and transacted business on behalf of each of the two Lummus Companies in Puerto Rico before and after May 4, 1959, when the summons and complaint were filed and served herein, particularly in connection with the procurement of goods and services in Puerto Rico. Purchase orders were signed and issued in the name of The Lummus Company in Puerto Rico for the procurement of goods and services in Puerto Rico before and after May 4, 1959.

(F) The defendant, The Lummus Company, is subject to suit in Puerto Rico herein and was properly served with process in Puerto Rico in the present case.

3. The parties signed a contract dated July 8, 1954, under the terms of which Lummus was to build for Commonwealth for a maximum cost of $19,000,000 an oil refinery on the Bahía de Guayanilla approximately twelve miles west of the city of Ponce, Puerto Rico.

4. The parties signed a second contract dated March 14, 1956, effective September 1, 1955, providing for the expansion of Commonwealth's said oil refinery by the construction by Lummus of new facilities there, at a maximum price of $15,985,400.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

5. Each of the contracts referred to in paragraphs 3 and 4 hereof contained the following provisions:

> "25.1 Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of The American Arbitration Association. This agreement shall be enforceable and judgment upon any award rendered by all of a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in New York, U. S. A. It is agreed, however, that this agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests. * * *
>
> "26.1 When this agreement is executed . . . it . . . shall be deemed to have been made, executed and delivered in New York, New York . . ."

6. Claims by each party against the other have been asserted and have been accruing since 1956. Commonwealth has withheld payments under the contracts because of the claims it alleges against Lummus and because of challenges to the justness of certain items charged. The parties agreed to postpone litigation to avoid any inhibition on a public offering of securities by Commonwealth commencing in late December 1957. Now the following proceedings have been had:

(A) Lummus prepared a demand dated April 27, 1959, on a form supplied by The Commercial Arbitration Tribunal of the American Arbitration Associa-

tion, for an award in its favor against Commonwealth of $4,697,997.85 with interest in payment of its claims under the refinery construction contracts "and a determination of any set-offs or counterclaims against the undersigned which Commonwealth may assert." This demand was mailed by Lummus to Commonwealth April 29, 1959, and one copy of it was received by Commonwealth in New York on April 30, 1959.

(B) The American Arbitration Association mailed to Commonwealth a notice dated April 30, 1959 of this demand for arbitration, which was received at Commonwealth's offices in Ponce on May 4, 1959.

(C) On May 4, 1959 the present action was commenced in this Court by the filing of a complaint in two counts, both based on allegations that Lummus represented itself to Commonwealth as having special and expert knowledge and experience in the preparation of oil refinery economic and capability studies and earnings projections based thereon (hereinafter called "Studies and Projections") and in the design, construction and initial operation of oil refineries, that certain "Studies and Projections" were prepared by Lummus for the Commonwealth Refinery, that Commonwealth relied on Lummus' representations of such knowledge and experience in preparing "Studies and Projections" and in the design, construction and initial operation of oil refineries and relying upon such "Studies and Projections", and was induced thereby to enter into the contracts described in Paragraphs 3 and 4, supra, and that the representations in these

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

"Studies and Projections" were in fact false. The first count alleges that Lummus made these representations either knowing them to be false or with reckless indifference as to their truth or falsity, and therefore demands damages in the sum of $60,000,000 plus other sums not yet determined and rescission or a declaration of nullity of the two contracts; the second count alleges that the representations were made negligently, and demands $60,000,000 plus other sums yet undetermined as damages for harm proximately caused by this negligence.

(D) On May 4, 1959, Commonwealth also filed in this Court a motion (in the present tort case) for an order pursuant to 32 L.P.R.A. Section 3204(4)(A) staying the arbitration demanded by Lummus on the form of the American Arbitration Association and restraining defendant from taking any steps in furtherance of said arbitration. The motion was set for hearing on May 8, 1959.

(E) On May 6, 1959, Commonwealth stipulated, at the request of Lummus, to postpone the hearing on said motion to stay arbitration from May 8, to May 29, 1959.

(F) On May 20, 1959, Lummus delivered to the Secretary of State of New York a copy of a motion, dated May 19, 1959, in the Supreme Court of the State of New York, County of New York, based upon a contemporaneous petition verified by its president, for an order directing that arbitration proceed between Lummus and Commonwealth, in accordance with the con-

tracts between said companies dated July 8, 1954, and March 14, 1956, and for such other and further relief as may be just and proper.

The petition for this relief alleged jurisdiction, the making and terms of the contracts, Lummus' performance thereof and Commonwealth's default, and that Commonwealth had begun the action in this Court. A second copy of the said motion, petition, and accompanying exhibits was delivered to the Secretary of Commonwealth in New York on May 22. The motion was noticed for hearing on June 8, 1959. It was on May 25, 1959, assigned Index No. 7047 of 1959 by the Clerk of the County of New York.

(G) On May 25 Commonwealth removed the said action from the Supreme Court of New York to the United States District Court for the Southern District of New York where it was docketed as Civil No. 146-246.

(H) On May 26 the parties stipulated to postpone the hearing on plaintiff's motion to stay arbitration, made May 4, 1959, in the present action in this Court, from May 29 to June 1, for their convenience and that of the Court.

(I) On May 29 Lummus presented for signature by the United States District Court for the Southern District of New York an order (1) requiring Commonwealth to show cause on June 4 why it should not be enjoined from all further proceedings in Puerto Rico and (2) restraining Commonwealth from such proceedings until the determination whether an injunction

should be issued. The Court signed the order, but accelerated the hearing to June 2 and struck out the clause restraining Commonwealth in the interim. Counsel for Lummus had orally notified counsel for Commonwealth that it intended to present this order to show cause, and counsel for Commonwealth appeared in opposition to the granting of said order to show cause.

(J) On May 29, the same day, shortly after 1:00 p.m., without notice to counsel for Lummus, counsel for Commonwealth informed this Court that counsel for Lummus had advised that they intended to apply to the court in New York for the relief described in the preceding paragraph hereof and counsel for Commonwealth moved this Court for a temporary restraining order; this Court granted the motion and issued an *ex parte* order restraining Lummus from any further proceedings in the said action in the United States District Court for the Southern District of New York. This temporary restraining order was signed at 3:38 P.M. on May 29, 1959.

(K) On June 1, 1959, the parties were heard at length by this Court and a great bulk of affidavits and exhibits was received by the court. Lummus moved to vacate the temporary restraining order, and Commonwealth moved to continue it; the court ordered the temporary restraining order continued for another ten days, which expired at 3:38 p.m. on June 18, 1959.

(L) The hearing on the return of the order to show cause in the United States District Court for the

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

Southern District of New York was adjourned from June 2 to June 9, then to June 18, thereafter to June 23.

(M) On June 5, 1959, a further hearing on the question whether a preliminary injunction should be entered was held before this Court.

(N) On June 17, 1959 Commonwealth moved in this Court, before Circuit Judge Calvert Magruder, retired, sitting by assignment, to enjoin Lummus temporarily from taking any further proceedings in the New York case pending the decision of Commonwealth's motion to stay arbitration dated May 4, 1959 and its motion for a temporary injunction dated June 1, 1959.

(O) On June 18, 1959 Judge Magruder heard argument on the said motion of June 17 in this Court.

(P) On June 19, 1959 Judge Magruder granted Commonwealth's motion of June 17 and made an order for preliminary injunction restraining Lummus from further prosecuting the New York case until entry of this Court's decision on Commonwealth's motions of May 4 and June 1, 1959, or until 12:00 midnight July 20, 1959, whichever was earlier.

(Q) On June 25, 1959 Judge Magruder filed herein an opinion further explaining the grounds of his decision of June 19, 1959.

(R) Well over 80-odd exhibits have been introduced, so thick that they almost fill a filing cabinet drawer, some 20 affidavits have been filed, to several of

which numerous exhibits are attached, and 6 memoranda of law have been submitted. The transcript of the hearings on June 1 and June 5 is 102 pages long, the transcript of hearing on June 18, 1959 was 58 pages long.

7. The "Studies and Projections" submitted by Lummus to Commonwealth contain detailed scientific representations concerning the productivity of the Commonwealth refinery and economic evaluations, including such predictions as the time that would be required to recoup certain investments.

8. Commonwealth can probably prove that these representations have in fact been proved to be false.

9. Commonwealth can introduce evidence that it relied upon these representations to its detriment.

10. Commonwealth can introduce evidence that it would not have entered into the given contracts or perhaps any contracts with Lummus but for these representations.

11. Commonwealth can introduce evidence tending to prove that these representations were made knowing them to be untrue or not caring whether they were true, so as to prove that they were fraudulent.

12. A substantial dispute has arisen and a substantial issue exists as between Commonwealth and Lummus as to whether there was fraud in the inducement of the contracts of July 8, 1954 and March 14, 1956.

that is, as to whether there was a material misrepresentation of the subject matter of the contracts which might make the consent of the parties unreal and nullify the whole contract including the arbitration clause.

13. The amount in controversy in the judicial proceedings commenced by Lummus in the Supreme Court of the State of New York, County of New York, on May 20-22, 1959, to compel arbitration exceeds the sum or value of $10,000 exclusive of interest and costs and is between citizens of different states.

14. The said judicial proceedings were commenced by Lummus in the Supreme Court of the State of New York, County of New York on May 20-22, 1959.

15. Lummus, if unrestrained, may seek to prosecute its motion for an injunction prohibiting Commonwealth from further proceeding in this Court, thus interfering with the jurisdiction of this Court to determine the questions raised by the motions and pleadings in the present case, including matters now before this Court for an adjudication.

16. Lummus, if unrestrained, may seek to prosecute its action in the Courts of New York, seeking remand and/or an order directing the parties to submit to arbitration in New York.

17. All issues presented by Lummus to the New York Court are raised in the present case and will be adjudicated in the present case. The issues Lummus

seeks to present to the Arbitration Tribunal in New York can all be raised in the present case in this Court and many of them are comprehended by the complaint in the present case.

18. Defense of the actions in the Court and in the Arbitration Tribunal in New York while prosecuting the present case in this Court will result in an additional burden of time, trouble, and expense to Commonwealth which is unnecessary and avoidable. Moreover, it will constitute a similar burden to Lummus and to the Federal judicial system.

19. These duplicating litigations create a risk of an unseemly and damaging race of diligence and/or of inconsistent and incompatible decisions in the several tribunals.

20. No evidence has been introduced tending to show that any harm to Lummus other than that compensable by interests on its recovery will be risked or suffered because of an injunction and stay of further prosecution of said judicial proceedings in N. Y. Sup. Ct. and the further prosecution of proceedings before the Arbitration Tribunal in New York pending determination on a plenary trial of the issue of fraud in the inducement of the contracts dated July 8, 1954 and March 14, 1956 common to the complaint herein and to plaintiff's motion for a stay of the arbitration and for a restraint of defendant from taking any steps in furtherance of such arbitration; and pending the entry, after such plenary trial of

such issue, of a final order on the said motion. The suggestion of counsel for Lummus that Commonwealth is financially irresponsible is unsupported by the record.

CONCLUSIONS OF LAW

I. This Court has jurisdiction to enter the present order against defendant The Lummus Company. This Court has undoubted jurisdiction over the subject matter.

II. The complaint herein and the affidavit submitted in support of plaintiff's motion of May 4, present allegations of fraud in the inducement of the contracts of July 8, 1954, and March 14, 1956.

III. Plaintiff Commonwealth has pleaded and by its affidavits and exhibits has made out a prima facie showing of ability to prove upon a plenary trial the issue of such fraud in the inducement.

IV. The fraud alleged and of which a prima facie showing of ability to prove has been so made, would, if it is so proved, vitiate the whole of the contracts; the issue of such fraud in the inducement is not arbitrable and cannot be submitted to arbitration.

V. A substantial dispute has arisen as regards the validity and existence of the arbitration agreements by reason of the existence of a substantial dispute as to whether the said contracts of July 8, 1954, and March

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

14, 1956, were induced by fraud which would nullify the contracts and the arbitration clauses within them.

VI. The substantial dispute as to the validity and existence of the arbitration agreements arising by reason of the allegations of fraud in the inducement requires resolution by a plenary judicial trial of the issues, other than issues of damages, to be framed by the complaint herein and any answer that defendant Lummus interposes as hereinafter provided.

VII. The questions raised in the present case concerning the staying of the arbitration demanded by defendant Lummus are governed by the Arbitration Law of Puerto Rico, including Title 32 of the Laws of Puerto Rico Annotated, Sections 3201 *et seq.*

VIII. The threatened multiplicity of litigation constitutes a danger of irreparable harm to Commonwealth which, together with Commonwealth's lack of any other adequate remedy, is sufficient to invoke the jurisdiction of a court of equity and satisfy the requirements of Rule 65 of Federal Rules of Civil Procedure.

IX. This Court therefore has the power, in its discretion, to enjoin the taking of any further steps or proceedings by Lummus in the United States District Court for the Southern District of New York, or before the Commercial Arbitration Tribunal of the American Arbitration Association in order to prevent interference with the orderly determination by this

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

Court of matters as to which it has acquired primary jurisdiction and which it now has pending before it, to avoid duplication of litigation, and to promote an orderly administration of justice in the adjudication of the issues between these parties.

X. On all the facts, and the showing made by the parties and their declared intentions, this Court is warranted in exercising its discretion to grant the motion of Commonwealth filed June 1, 1959, for a preliminary injunction to endure until final determination of the substantial dispute concerning the validity and existence of the arbitration agreements and the entry of a final order thereon.

XI. On all the facts, and the showing made by the parties and their declared intentions, and pursuant to Federal Rules of Civil Procedure 65(C), this Court holds the amount of an adequate security for this injunction to be fifty thousand dollars ($50,000.00).

XII. The motion of Lummus to compel arbitration, made in the Supreme Court of the State of New York, County of New York, was and is a civil action of which the District Courts of the United States have original jurisdiction and it was lawfully removed to and is now pending in the District Court of the United States for the Southern District of New York, the district embracing the place where the said civil action was originally pending.

NOW, THEREFORE, the Court being duly advised, and believing in its discretion that the injunctive relief sought should be granted to the plaintiff,

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

IT IS HEREBY ORDERED, ADJUDGED AND DECIDED:

1. That the arbitration demanded by defendant herein, of which plaintiff received notices on Thursday, April 30 and Friday, May 1, 1959, is stayed until this Court enters its order finally determining whether there are valid and existing arbitration agreements, between the parties and whether the said arbitration should be permanently stayed.

2. That the time of defendant to file its answer to the complaint herein, and to file any motion permitted under the provisions of Rule 12 of the Rules of Civil Procedure, is extended until twenty days after the date of the entry of the present order.

3. That the date for and manner of plenary trial of the issues respecting the alleged fraudulent inducement of the contracts dated July 8, 1954 and March 14, 1956 will be determined by further order of the Court after issue has been joined upon the pleadings.

4. The pretrial depositions, discovery and interrogatories will be limited, until further order of the Court, to the issues, other than damages, framed by the pleadings.

5. That plaintiff's motion, dated June 1, 1959, for a preliminary injunction and other relief is granted as follows:

(A) Defendant, The Lummus Company, its agents, servants, employees, and attorneys, and all persons

acting in concert with them or on their behalf, are hereby enjoined and restrained from prosecuting or taking any further action in the case pending in the United States District Court for the Southern District of New York entitled "*In the Matter of the Arbitration of Certain Differences between The Lummus Company, Petitioner, and Commonwealth Oil Refining Company, Inc., Respondent*," Civil Action No. 146-246, until this Court enters its order finally determining whether there are valid and existing arbitration agreements between the parties and whether the said arbitration so demanded should be permanently stayed.

(B) The defendant, The Lummus Company, its agents, servants, employees, and attorneys, and all persons acting in concert with them or on their behalf are hereby enjoined and restrained from taking any steps in pursuance or furtherance of the arbitration demanded by defendant, The Lummus Company, herein of which plaintiff received notices by registered mail on April 30 and May 1, 1959, until this Court enters its order finally determining whether there are valid and existing arbitration agreements between the parties and whether the said arbitration so demanded should be permanently stayed.

(C) The security posted by the defendant in the sum of $15,000.00 and approved by the Clerk is hereby continued in full force and effect as security upon this injunction and plaintiff is hereby required to file further security in a form satisfactory to the Clerk in the amount of $35,000.00.

Order for Preliminary Injunction, Entered in District Court for the District of Puerto Rico (Ruiz Nazario, J.) on July 20, 1959

6. That this order be notified to the attorneys of record in this case for the plaintiff and for the defendant, and a copy of this order be sent by registered mail to The Lummus Company, 385 Madison Avenue, New York 17, New York, and to Messrs. Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York, its attorneys of record in the action pending in the United States District Court for the Southern District of New York entitled "*In the Matter of the Arbitration of Certain Differences between The Lummus Company, Petitioner, and Commonwealth Oil Refining Company, Inc., Respondent, Civil Action No. 146-246,*" and to the American Arbitration Association, 477 Madison Avenue, New York 22, New York.

San Juan, Puerto Rico, this 20th day of July, 1959, at 2:58 P.M.

(Sgd.) CLEMENTE RUIZ NAZARIO
Clemente Ruiz Nazario
United States District Judge

ATTEST: A TRUE COPY OF THE
ORIGINAL ON FILE IN THIS OFFICE.

I certify that the security in the amount of $35,000.00 mentioned herein was posted to my satisfaction. San Juan, P.R., July 20, 1959.

/s/ MARY AGUAYO
Mary Aguayo, Clerk,
U. S. District Court for P. R.

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5552

THE LUMMUS COMPANY,
Defendant-Appellant,

v.

COMMONWEALTH OIL REFINING COMPANY, INC.,
Plaintiff-Appellee.

No. 5553

SAME v. SAME; and

No. 5554

SAME v. SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

JOHN T. CAHILL, with whom LAWRENCE J. McKAY, RAYMOND L. FALLS, JR., HERBERT S. McCONNELL,

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960

PUTNAM, BELL, SANTRY & RAY, CAHILL, GORDON, REINDEL & OHL and MCCONNELL, VALDES & KELLEY, were on brief, for appellant.

JOHN F. DOOLING, JR., with whom RICHARD DEY. MANNING, MILTON POLLACK, HAMILTON F. POTTER, JR., JEFFREY A. FILLMAN, RUBEN RODRIGUEZ-ANTONGIORGI, SULLIVAN & CROMWELL and FIDDLER, GONZALES, GUILLEMARD & RODRIGUEZ were on brief for appellee.

OPINION OF THE COURT

June 16, 1960.

ALDRICH, *Circuit Judge*. This is an appeal under 28 U.S.C. §1292(a) (1) from an interlocutory order, dated July 20, 1959, of the United States District Court for the District of Puerto Rico entering a preliminary stay of arbitration and granting a preliminary injunction enjoining defendant-appellant from taking any further action in a case pending in the United States District Court for the Southern District of New York, or any other steps in furtherance of the arbitration. Defendant-appellant, The Lummus Company, a Delaware corporation with its principal office in New York, N. Y., is engaged, *inter alia*, in designing and constructing oil refineries. Plaintiff-appellee, Commonwealth Oil Refining Co., Inc., is a Puerto Rican corporation, which describes itself as the owner of an oil refinery in Puerto Rico built for it by the defendant. The controversy between the parties arises out of two contracts entered into in New York in July 1954, and March 1956, under which Lum-

mus undertook to design, build, initially supervise, and guarantee the performance of, first, the original refinery, and then later its expansion facilities, for a guaranteed maximum cost of some $35,000,000. Both contracts contain the following clause:

> "Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration. . . . The arbitration *shall be held in* New York, U. S. A."[1]

The refinery has been built, and Lummus has received some $32,500,000 therefor. The original plant commenced operation on December 31, 1955, and the expansion facilities on September 30, 1957. Operation, however, has been at a marked loss, rather than at the substantial profit anticipated. Since at least 1957 Commonwealth has expressed dissatisfaction with Lummus' performance, and Lummus, *inter alia*, with Commonwealth's refusal to pay sums claimed to be due for work and materials.

On April 29, 1959, Lummus mailed, and on April 30 Commonwealth received, a demand for arbitration of

[1] The entire clause reads:

> "25.1 Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association. This Agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in New York, U.S.A. It is agreed, however, that this Agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests."

No issue has been raised with respect to the last sentence and we assume it has no applicability to the claims here involved.

its claim to recover some $4,700,000 from Commonwealth, and of "any set-offs or counterclaims . . . which Commonwealth may assert." On May 4, Commonwealth instituted an action in the District of Puerto Rico, in which it alleged, in substance, that Lummus had prepared "oil refinery economic and capability studies and earnings projections based thereon (herein called, collectively, 'studies and projections')" relating to the refinery; that the " 'studies and projections' were false and misleading," and that Lummus either knew this to be so or made the representations "with reckless indifference as to the truth or falsity thereof"; that Commonwealth relied on the "studies and projections" and was induced by the representations contained therein to execute the two contracts, "which plaintiff would not have executed but for such false and misleading 'studies and projections' . . ."; and that, "by reason of the facts set forth in this complaint, plaintiff has suffered financial losses and damages in an amount exceeding $60,000,000. . . ." As relief, the complaint sought:

"(a) judgment . . . in the sum of $60,000,000, plus other sums as yet undetermined . . .; and

"(b) such rescission under the laws of the State of New York of the two contracts . . . as may be just and equitable . . . or a declaration as to their inexistence under the laws of the Commonwealth of Puerto Rico. . . ."[2] At the same time Commonwealth served

[2] We will analyze this complaint in more detail later. There is a further claim not material to the present proceedings, as no preliminary relief is requested thereunder, which will be disregarded.

a motion in the district court, "pursuant to 32 L.P.R.A. §3204(4)(a),"[3] to stay the New York arbitration on the ground that the arbitration clauses were invalid by reason of fraudulent inducement of the contracts. On May 20 Lummus served a motion in the New York County Supreme Court to compel arbitration. On May 25 Commonwealth filed a petition to remove that proceeding to the United States District Court for the Southern District of New York, hereinafter called the Southern District. On May 29 Lummus obtained from that court an order for Commonwealth to show cause, returnable June 2, why the present proceedings should not be enjoined. No further steps were taken in the Southern District because on the same day Commonwealth obtained from the court below, *ex parte*, a temporary order restraining further proceedings in the Southern District. On June 1, Commonwealth moved for a preliminary injunction restraining Lummus from taking any further action in the Southern District or elsewhere in furtherance of arbitration until final determination of the motion of May 4 for a stay of arbitration. Decision was reserved on this motion, but the temporary restraining order was continued in force to June 18. On that date, Judge Ruiz Nazario being out of the district, a hearing was held before Senior Judge Magruder, sitting in the district court by special assignment, on the matter of continuing the temporary restraining order pending determination by Judge Ruiz Nazario of the

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[3] Chapter 259, §§3201-29, Title 32 L.P.R.A., constitutes the Puerto Rico Arbitration Act. Its provisions are typical of modern arbitration statutes. The provisions relevant here are discussed further, *infra*.

original motion to stay arbitration, and of the motion for a preliminary injunction. On June 19 Judge Magruder entered a preliminary injunction, to expire July 20, stating that he was doing so in order to give Judge Ruiz Nazario opportunity to make the final decision on the questions before him. See 174 F. Supp. 485. On July 6 Lummus moved for a modification of Judge Magruder's order to permit it to move in the Southern District to remand that action to the state court. This motion was denied on July 17. See 175 F.Supp. 873.[4] On July 20 Judge Ruiz Nazario entered an order preliminarily staying the arbitration "until this Court enters its order finally determining whether there are valid and existing arbitration agreements . . .," and granted the preliminary injunction enjoining Lummus from taking any steps in furtherance of the arbitration, in the Southern District or otherwise.

Admittedly Lummus' appeal from the decree of July 20 presents all pertinent matters. It raises a substantial number of difficult questions. They can be divided into three major groupings. First, Lummus contends that the district court, as a matter of equitable jurisdiction, should not have enjoined the New York proceedings, but should rather have stayed its own. It bases this contention, first, on the priority of the New York proceedings, arguing that they commenced with the service of the arbitration demand, and second, on the contention that New York is a more proper forum because New York law is controlling,

[4] Appeals from these orders of June 19 and July 17 are also before us. They will be separately considered.

because New York is more convenient for the parties and witnesses, and because jurisdiction over Lummus in Puerto Rico is doubtful.[5] We do not stop to consider these contentions at any length. What we presently have here is simply a question of two pending actions, *i.e.*, the motion to stay arbitration and the action to compel arbitration, *in two federal courts* of concurrent jurisdiction, each of which is being asked to consider what is basically a different side of the same coin. There is no reason why both suits should continue at the same time. This would be detrimental to both the parties and the federal judicial system. Although priority of suit is often taken as a basic factor in determining which should give way, see *Martin* v. *Graybar Elec. Co.*, 7 Cir., 1959, 266 F.2d 202, "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 1952, 342 U.S. 180, 183. We are disposed to believe that the District Court in Puerto Rico was in fact the first *court* to take hold of this matter. *Cf. Marchant* v. *Mead-Morrison Mfg. Co.*, 2 Cir., 1928, 29 F. 2d 40, 42-43, *cert. den.*, 1929, 278 U. S. 655; *American Houses, Inc.* v. *Schneider*, 3 Cir., 1954, 211 F.2d 881, 885; *Minkoff* v. *Scranton Frocks, Inc.*, D.C.S.D.N.Y., 1959, 172 F. Supp. 870, 876-77. We also believe that there were sufficient reasons which

[5] This last matter was argued to some extent below and the court preliminarily found that jurisdiction over the person of Lummus had been obtained. We concur in this preliminary finding, but the issue is not really before us on this appeal except in this tangential fashion.

would have justified that court, as a matter of discretion, in staying its own proceedings in favor of those in New York. But as it has not done so, we are not prepared to hold that there was an abuse of discretion.

The second grouping of issues concerns the power of the district court. Lummus contends that a federal court sitting in Puerto Rico is unable to stay an arbitration which the parties have specified is to take place in New York. In the view we take of this case, this issue becomes moot. It also contends that the New York proceedings were improperly removed from the state court, and that had they remained there, 28 U.S.C. §2283 admittedly would have prevented the court below from enjoining the proceedings in the state court. It assigns three reasons why the removal was improper. First, a motion to compel arbitration under a state statute involves a remedy which a federal court cannot grant; second, the removal was not timely because not made within twenty days after the service of the demand for arbitration; and third, the Southern District, as an Article III court, is without diversity jurisdiction because Commonwealth is a citizen of Puerto Rico, which is not a State within the meaning of Article III of the Constitution. Should we answer the first two contentions in favor of Commonwealth, we would be faced with the third, which raises constitutional issues. Under familiar principles, these should not be decided unless necessary. We accordingly pass to the third grouping, which we find dispositive. This is that Commonwealth's allegations of fraudulent inducement present no substantial

issue as to the voidability of the arbitration contracts which would warrant a plenary hearing.

All facts were established by affidavits and exhibits. Commonwealth was incorporated in May 1953. Since October 1951, however, Lummus had been working with those persons who were promoting and organizing the refinery. The organizers were engaged in securing contracts for the purchase of crude oil, commitments for the sale of refined products, financial backing, and, of course, designs and a contract for construction. Lummus assisted the organizers, and then the corporation itself, in their negotiations for purchase and sale contracts. It also supplied the corporation with economic and profitability estimates for many hypothetical refineries. Upon being told what type of crude oil would be used and what type of refined products were desired, Lummus would estimate the type of refinery needed, the capital outlay for such a refinery, and the expected profit. These estimates went through a number of revisions as different types of crudes or refined products were hypothesized. Essentially the same type of estimates were also made for the expansion facilities. Some of the figures concerning product yields supplied by Lummus were also used by the underwriters in charge of the financing in the preparation of profitability forecasts which were included in two volumes, known as the Green and White Books, used to interest prospective investors. The construction contracts with Lummus were negotiated over a long period of time, and each had an effective date at least six months prior to the date of execution. The contracts guaranteed the maximum

construction costs, and guaranteed product yields, both as to quantity and quality, but neither contained the type of profitability forecasts which Lummus had earlier furnished. Both contracts contained provisions for performance tests designed to establish whether or not the refineries met the contractual guarantees. For various reasons, including the fact that Commonwealth has not been processing the crude oils upon which the guaranteed yields were based, Lummus' demands for tests have not been met. Thus has been a major area of contention.

In May 1956, two months after making the contract for the expansion facilities, Commonwealth ceased making payments due to Lummus under the original contract, claiming setoffs. In October 1956, it informed Lummus that, "Recent reports appear to confirm our fears concerning possible basic inadequacies in design or construction." Commonwealth's Annual Report for 1956, dated January 31, 1957, indicates a number of the difficulties encountered in operations which resulted in a substantial loss instead of a contemplated profit. It stated that "our greatest difficulties have been with the vacuum tower, the catalytic cracker and the utilities, namely, power, steam and cooling water." It appears from the record that the irregular electric power supply was the fault of the Puerto Rico Water Resources Authority, but that the irregularities had caused considerable loss of operating time because of the use of highly sensitive control mechanisms which needed a more stable power source. In February 1957, there were extensive changes in top management, and the executive offices

were moved from New York to Puerto Rico. In May 1957, the M. W. Kellogg Co. was hired by the underwriters to make an independent evaluation of the refinery. The report, dated November 25, 1957, as of October 23, 1957, pinpointed four major factors accounting for an "uneconomic operating history." These were: 1. unreliable electric power; 2. electronic instrumentation incompatible with the power supply; 3. circulation difficulties in the catalytic cracking unit; and 4. "an overly integrated heat exchange system. . . ." (This latter had also been pointed out to Commonwealth by another independent study submitted in January 1956.) The report indicated that steps had already been taken to correct some of these deficiencies and that upon completion of other planned capital expenditures, the refinery "is, in general, mechanically sound and capable of operation on a normal basis." The report also stated that, "The present top management is now thoroughly competent and deserving of every reasonable confidence." The Kellogg report also estimated a yearly return for the refinery after certain basic improvements had been made, and stated: "This figure is [approximately one half that] . . . depicted in the so-called 'White Book—Case C'. The 'White Book' figures are grossly optimistic with respect to yields of the high quality (high price) products and operating costs." The report then recommended substantial additional capital expenditures which would, in its opinion, achieve returns comparable to those which had been originally predicted.

It appears from the record that Commonwealth and Lummus continued working together to adjust their

differences until shortly before this suit was brought.[6] Lummus apparently had men working at the refinery under the contracts until at least February 1959. Meetings were held between officials of both companies and the underwriters during 1958 and 1959, the last having been held on March 24, 1959. Another was scheduled for April 24, but postponed to May 4, before which date Lummus demanded arbitration. The record also contains the affidavit of Commonwealth's president (who took office in February 1957 upon the change of management). He calls attention to the Kellogg report and seeks to establish that the figures described as "grossly optimistic" therein were based on product yields supplied by Lummus. He also seeks to rebut any inference which might be drawn from the fact that in 1958 Commonwealth also contracted with Lummus to build an additional unit costing almost $3,000,000, which unit was completed and accepted in March 1959, pointing out that at the same time Commonwealth indicated its continuing dissatisfaction with the refinery, but felt compelled to use Lummus in order to speed completion of the new unit. Finally, after first establishing his qualifications as a chemical engineer who has spent his "entire time working in or closely associated with petroleum refining, research, operation, design construction and administration," affiant states:

> "I believe that the anticipated product yields and resulting earning projections set forth in the Green and White Books were not based on sound

[6] These differences, as will be developed *infra*, did not include any charges of fraud, the basis of the present proceedings.

> technical estimates prepared in accordance with the standards of professional refinery engineering. I believe they were based on estimates which Lummus personnel, from the very nature of the engineering and economic analysis they were making, must have known were false or misleading or which they should have known were false or misleading or, else that they were prepared without any belief or any sound engineering foundation for a belief, on the part of Lummus that refinery equipment capable of attaining such yields and projected earnings could be constructed at the price it guaranteed."

There are many "or"s in this statement, but we will assume for present purposes that it asserts legal fraud.

The district court believed that Commonwealth's right to stay arbitration was governed by the Puerto Rico arbitration statute, particularly by §§3201 and 3204, Title 32 L.P.R.A. These sections are essentially similar to related sections of both the New York and federal arbitration acts, and we need not decide which is ultimately the governing statute.[7] Under the New

[7] Questions as to the governing law of this case in a number of different contexts have been much mooted before us, but neither party has been entirely consistent in using the law it suggests as controlling. Commonwealth tells us we must look to the law of Puerto Rico but presents us with none (other than the arbitration statute). Lummus contends that New York law applies, but then, in its reply brief, on the basis of the decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 2 Cir., 1959, 271 F.2d 402, *cert. granted*, 1960, 362 U.S. 909, tells us that the U.S. Arbitration Act governs. If this latter be so, then of course some of its objections to the power and jurisdiction of both the Puerto Rican and New

York act, persons "may contract to settle by arbitration a controversy thereafter arising between them and such . . . contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." If arbitration is demanded and the "opposing party . . . sets forth evidentiary facts raising a substantial issue as to the making of the contract . . ., an immediate trial of the same shall be had." N.Y. Civ. Prac. Act, §§1448, 1458, subd. 2. See also *id.*, §§1450, 1451. The Puerto Rican Statute provides that agreements to arbitrate "shall be valid, requirable and irrevocable except for the grounds prescribed by law for the reversal of an agreement." "If the court finds that a substantial dispute has arisen as regards the validity or existence of the arbitration agreement, . . . the court shall proceed immediately to hear such dispute." "In order to give rise to [such] a dispute . . ., the party concerned shall state the proved facts on which said dispute is founded . . . ." 32 L.P.R.A. §§3201, 3204(2), (4). The federal statute follows the earlier New York form and omits the word "substantial," but is otherwise not significantly different. See 9 U.S.C. §§2, 4.

The court granted the stay upon finding that "Commonwealth can probably prove that [Lummus'] . . . representations have in fact been proved to be false"; that "Commonwealth can introduce evidence that it relied upon these representations . . .," and

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York district courts collapse. We give our reasons below for applying New York law to the question of construction of the arbitration contracts, but beyond this we do not find it necessary to go.

"that it would not have entered into the given contracts or perhaps any contracts with Lummus but for these representations"; and that "Commonwealth can introduce evidence tending to prove that these representations . . . were fraudulent." It then concluded: "A substantial dispute has arisen and a substantial issue exists . . . as to whether there was fraud in the inducement of the contracts . . . ." These findings are the essential foundation for Commonwealth's case. Lummus contends that they were unwarranted. Although arguments have been presented on the issues of falsity and reliance, we believe that a substantial issue has been made out. The real difficulty lies in the question of fraudulent (or reckless) intent. We think that Commonwealth has assumed a difficult task to establish that a concern of defendant's admitted reputation and consequence not merely undertook to build a $35,000,000 refinery, but agreed to guarantee the maximum price and the performance, with reckless indifference, let alone intentional misrepresentations, as to whether that performance could be achieved. The evidence before us from which such intent or conduct could be inferred is merely the reference in the Kellogg report to the "grossly optimistic" figures of the White Book, and the conclusory allegations of Commonwealth's president. But having in mind the intangible nature of fraud, and the inherent difficulties of proof, we are short of willing to reverse the lower court's preliminary findings, and believe it preferable to look into other issues.

In his opinion supporting his order of June 19, Judge Magruder stated: "If the District Court finds

the fraud to be [in the inducement] . . . and that such fraud vitiates the whole contract, the issue of fraud obviously cannot be submitted to arbitration. The Court is thus obliged to decide preliminarily whether the contract and the arbitration clause within it are nullified by fraud. This is so under New York law as well as under Puerto Rican law. [Citation of New York cases omitted]." 174 F.Supp. 485, at 488. Judge Ruiz Nazario adopted the same approach when he ruled that, "The fraud alleged . . . would, if it is so proved, vitiate the whole of the contracts; the issue of such fraud in the inducement is not arbitrable and cannot be submitted to arbitration." We think that this ruling, and Judge Magruder's corresponding remark that "the issue of fraud obviously cannot be submitted to arbitration," require further consideration. First, must the fraud which may have induced[8] the agreements whereby Lummus undertook to design, build, and guarantee the refineries (which contracts, minus the arbitration clauses, we shall call the principal agreements) be regarded as vitiating the undertakings to arbitrate? That is, may not the arbitration agreements be considered as separate and separable contracts even though they are physically embodied in the same instruments as th principal agreements? Secondly, if the arbitration clauses are not separable, are claims within the scope of the arbitration clause necessarily non-arbitrable, or do they merely become so by virtue of Commonwealth's election to avoid the principal agreements? And finally, if the avoidance

[8] No question arises in this case, or in any of the cases cited in this opinion, as to fraud in the factum, a very different matter.

of the principal agreements is requisite to the avoidance of the arbitration clauses, has Commonwealth properly sought to exercise that right?

Although we have assumed that Commonwealth has made a prima facie showing of voidability so far as the principal agreements are concerned, with respect to its agreement to arbitrate, considered of itself, there appear to have been no factual misrepresentations at all. If the agreement to build and the agreement to arbitrate are to be regarded as a single agreement, both promises were obtained by the one fraud, and the one must fall with the other. But if the agreement to arbitrate is regarded as a separate undertaking, and particularly if it is broad enough to encompass any issue of fraud in the inducement, such an undertaking should not be voidable unless there was fraud directed specifically to it. Commonwealth says that this is illogical. We think not. We see no reason why parties should not agree, if they wish to, that if a question arises as to whether the principal agreement was obtained by fraud, that that question will be arbitrated. For a court then to hold that fraud which bore only upon the principal agreement automatically invalidated the arbitration contract would be to destroy precisely what the parties had sought to create. Moreover, any other approach sets the stage for delaying action, and invites the injured party to cast what is basically a claim for breach of warranty or failure to perform, which would be arbitrable, into an action based on fraudulent inducement. In some instances, it may prevent even the injured party who wishes to arbitrate from doing so. The

very fraud for which he wishes to recover can be used by the defrauding party to take the plaintiff's claim from the arbitrator. *Cf. Wrap-Vertiser Corp.* v. *Plotnick*, 1957, 3 N.Y.2d 17, 163 N.Y.S.2d 639, 143 N.E.2d 366, *infra*. For these and other reasons, including an analysis of the language of the arbitration statutes themselves, a strong case can be made for construing arbitration agreements as separable from the principal agreements, and as voidable only for fraud directly affecting their existence, as distinguished from representations relating to the content or making of the principal agreements. See generally, *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., supra*, n.7; *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 2 Cir., 1960, 274 F.2d 805, 808-09; Parsell, Arbitration of Fraud in the Inducement of a Contract, 12 Cornell L.Q. 351 (1927); Sturges, Fraudulent Inducement as a Defense to the Enforcement of Arbitration Contracts, 36 Yale L.J. 866 (1927); Nussbaum, The "Separability Doctrine" in American and Foreign Arbitration, 17 N.Y.U.L.Q. Rev. 609 (1940).

This, however, is not a matter in which we feel free to follow our own views. See *Bernhardt* v. *Polygraphic Company of America*, 1956, 350 U.S. 198.[9]

[9] In the *Robert Lawrence* case, the Second Circuit treated the separability issue as a matter of federal law under the U.S. Arbitration Act. We question whether separability is a matter of federal rather than state law in a diversity case, whether or not the federal arbitration act applies for other purposes. See 73 Harv. L. Rev. 1382 (1960); *cf. American Airlines, Inc.* v. *Louisville & Jefferson County Air Bd.*, 6 Cir., 1959, 269 F.2d 811; *Ross* v. *Twentieth Century-Fox Film Corp.*, 9 Cir., 1956, 236 F.2d 632. *But see* Note, 69, Yale L.J. 847, 858-61 (1960).

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960

We think it clear that New York law must govern. Not only were the agreements made in New York, but the agreements to arbitrate were to be performed there. Other substantial contracts with New York include the negotiation of the agreements there, and the fact that at the time the contracts were made both parties maintained their principal executive offices there. Additionally, both contracts contained clauses stating that the contracts "shall be deemed to have been made, executed and delivered in New York, New York," a factor which indicates a choice of law by the parties themselves, as does provision for arbitration in New York.[10] Looking to that law, we believe that the New York courts would not approach this question as we would. Although the Court of Appeals has never squarely considered the separability doctrine, it has made observations on the subject which would have to be specifically withdrawn before it could reach our suggested result. See *Wrap-Veritier Corp.* v. *Plotnick*, *supra*. In that case, the parties had agreed to arbitrate any question "as to the validity, interpretation or performance of this agreement." Plotnick sought to arbitrate several matters, including one which the court held was a claim for damages for

[10] Commonwealth contends that reference to such matters in the contracts is foreclosed by the claim of voidability. Our belief that it is not is presently supported by Restatement 2d, Conflict of Laws (Tentative Draft No. 6, April 22, 1960) §§332a, Comments *d* and *e* 334b, Comment *c*. As far as significant contacts are concerned, it is true that actual construction took place in Puerto Rico. On the other hand, the designing of the refineries and the procuring of the equipment undoubtedly occurred in New York. See generally, *id.*, §§332a, 332b, 334b, 334e, 354b. See also *Cruz* v. *Dominguez*, 1905, 8 P.R.R. 551; *Colon* v. *Registrar of Aguadilla*, 1915, 22 P.R.R. 344; *Del Moral* v. *National City Bank*, 1937, 52 P.R.R. 221.

fraudulent inducement of the contract. The majority of the court held that this claim was not arbitrable because it did not fall within the terms of the particular arbitration clause. According to the court, the claim concerned neither "interpretation" nor "performance," and since Plotnick was affirming the contract by seeking damages rather than avoiding it by seeking rescission, the question of "validity" was not in issue. But the court went on to say that even if Plotnick had "asked for rescission, such an issue would have had to have been decided in court before it could be known that an agreement existed supplying a foundation for the jurisdiction of the arbitrators." 3 N.Y.2d at 20, 163 N.Y.S.2d at 641, 143 N.E.2d at 367. While this was only dictum, it was directly expressed. It also finds support in other New York decisions.[11] It is true that since that case the

[11] It is clear that a claim of rescission based upon total breach or "fraud in the performance" does not put in issue the "making of the contract." (This phrase, as previously noted, occurs in a number of places in the New York act. The Puerto Rican act uses the more precise phrase, "validity or existence of the arbitration agreement," but it is clear that the two have been treated as equivalent.) See, *e.g.*, *Matter of Kahn*, 1940, 284 N.Y. 515, 32 N.E.2d 534; *Lipman* v. *Hauser Shellac Co.*, 1942, 289 N.Y. 76, 43 N.E.2d 817; *Charles S. Fields, Inc.* v. *American Hydrotherm Corp.*, 1958, 5 A.D.2d 647, 174 N.Y.S.2d 184. But it has been held that a claim of fraudulent inducement does place it in issue, and "if the contract was voided by fraud the arbitration provision therein falls." *Cheney Bros.* v. *Joroco Dresses, Inc.*, 1926, 218 App. Div. 652, 219 N.Y. Supp. 96. That case was reversed in the Court of Appeals on the ground that no fraud had been shown, but the court expressly did not pass on the separability question. 1927, 245 N.Y. 375, 157 N.E. 272. For other cases similar to *Cheney Bros.*, see, *e.g.*, *Application of Grace*, 1940, 173 Misc. 765, 18 N.Y.S.2d 990, *aff'd without opinion*, 259 App. Div. 712, 18 N.Y.S.2d 1023; *Horli Chemical Sales Corp.* v. *Oliphant, Sup. Ct.*, 1945, 68 N.Y.S.2d 177; *Application of Manufacturers Chemical*

court has decided *Donann Realty Corp.* v. *Harris*, 1959, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597. There it was held that the plaintiff could not complain of fraud in the inducement of a contract to purchase a lease because of a provision in the agreement that the buyer was not relying upon any prior representations. The court said, 5 N.Y.2d, at 321, "It is not alleged that this provision was not understood, or that the provision itself was procured by fraud." The same observation could be made in the case at bar. If fraud can be said to relate only to the "principal agreement" so as not to affect a provision not to assert fraud, it is doubly difficult for us to see how fraud inducing the principal agreement renders inoperative a provision for arbitration. Possibly the court now, if squarely presented with this issue, will depart from its *obiter dictum* expressed in *Wrap-Vertiser*. But for the present we feel constrained to accept as an established doctrine of New York law that an arbitration clause cannot be treated as separable from the other parts of the contract.

Of course a contract which has been fraudulently induced is not void but merely voidable, and the injured party need not avoid the contract, but may elect to affirm and seek damages in deceit. This distinction was alluded to by the Court of Appeals in *Wrap-Vertiser*. We think the inference is clear from that court's decision that a mere damage claim, even though based on fraudulent inducement, does not put in issue the "making of the contract" and may be arbitrated under a sufficiently broad arbitration

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Co., 1940, 259 App. Div. 321, 19 N.Y.S.2d 171, app. dismissed, 283 N.Y. 679, 28 N.E.2d 404. The *Cheney Bros.* case is criticized by Dean Sturges in the comment noted *supra*, 36 Yale L.J. 506 (1927).

clause. Both the actual holding of that case and its relevant dictum seem well stated in the following passage: "If he [Plotnick] were seeking rescission, none of the items in his arbitration demand could be arbitrated until the issue of rescission had been determined in the courts. *Even in view of his affirmance of the contract,* it is still for the courts to determine whether he has been damaged by fraud in being induced to enter into this agreement. Item 1 of Plotnick's arbitration demand does not spell out an arbitrable dispute *within the arbitration clause in this contract.*" 3 N.Y.2d at 19, 163 N.Y.S.2d at 640-41, 143 N.E.2d at 367 (ital. suppl.).

Since *Wrap-Vertiser,* the distinction between damage and recission claims has been applied in at least two other cases.[12] In *Amerotron Corp.* v. *Maxwell Shapiro Woolen Co.,* 1957, 3 A.D.2d 899, 162 N.Y.S.2d 214, the court confirmed an *ex parte* arbitration award entered against Shapiro, who claimed that the contract had been induced by fraud, and who had originally brought a deceit action against Amerotron in Massachusetts. The court stated: "By all of its actions respecting its claim of fraud inducing the contract, including its complaint in the Massachusetts action, . . . [Shapiro] failed to rescind the contract and elected to recognize the contract and claim damages for fraud. Such a claim was arbitrable and should have been arbitrated under the contract." On appeal,

[12] The distinction does not appear to have received explicit consideration in any earlier New York case. It is difficult to state the reason for this, because of the brevity of the opinion and their failure to set out the facts. It would appear, however, that in most of the cases the contracts were executory and the defrauded party was merely using the fraud defensively. Commonwealth, of course, seeks much more than this.

Shapiro argued, *inter alia*, that *Wrap-Veriser*, decided two days after the Appellate Division's decision in *Amcrotron*, had established that a claim of fraudulent inducement such as Shapiro's was not arbitrable. Brief for Respondent-Appellant Maxwell Shapiro Woolen Co. in the New York Court of Appeals, pp. 8-10. The Court of Appeals, however, affirmed, without opinion, the decision below. 1958, 4 N.Y.2d 722, 171 N.Y.S.2d 111, 148 N.E.2d 319.[13] In another recent case, the Appellate Division has again drawn a distinction between rescission and damage claims. *M. W. Kellogg Co. v. Monsanto Chemical Co.*, 1959, 9 A.D.2d 744, 192 N.Y.S.2d 869, affirming the decision of the New York County Supreme Court, N.Y.L.J., April 1, 1959, p. 12, col. 4. Monsanto had sued Kellogg in Delaware, seeking damages for fraudulent inducement of a contract, negligence, and failure to perform. Monsanto also sought, in Delaware, to enjoin Kellogg from prosecuting any arbitration proceedings in New York. Kellogg countered with motions in the New York court to compel arbitration and for temporary injunctions enjoining Monsanto from further prosecuting its Delaware actions. The court granted this relief, holding that all of the claims were arbitrable under the broad arbitration clause. The Appellate Division affirmed on the basis of *Amcrotron*, and distinguished *Wrap-Veriser* because of the narrow arbitration clause there involved. The court pointed out that by seeking damages the contract had been "affirmed" by the injured parties in both cases. We

[13] A fuller statement of this case may be found in *Maxwell Shapiro Woolen Co. v. Amcrotron Corp.*, 1959 Mass. Adv. Sheets 851, 158 N.E.2d 875, a related case arising out of the original tort action.

believe it fair to say that on the basis of these cases there is a trend in the New York decisions, if not towards an acceptance of separability, at least in the direction of a more careful consideration of what is sought when the party opposing arbitration cries fraud.[14] We hold that unless, by means of a proper claim for rescission, Commonwealth has put in issue the "making of the contract," it cannot, by merely asserting fraud, stay the arbitration proceedings.

The purpose of an action for rescission, as distinguished from one for damages, is to permit the defrauded party to obtain restitution of the benefits conferred by him.[15] The contract is not merely

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[14] See, *e.g.*, *Matter of General Fuse Co.*, 1956, 2 A.D.2d 695, 153 N.Y.S.2d 598, *later opinion*, 1957, 7 Misc.2d 997, 162 N.Y.S.2d 630, *reversed*, 1958, 5 A.D.2d 1013, 174 N.Y.S.2d 270; *Rio Garment, Inc. v. Jason Corp.*, 1958, 9 Misc.2d 521, 170 N.Y.S.2d 412, *modified*, 6 A.D.2d 401, 178 N.Y.S.2d 368, *aff'd without opinion*, 6 N.Y.2d 725, 185 N.Y.S.2d 812, 158 N.E.2d 505; *Bichler v. 160 Lexington Avenue Corp.*, 1957, 4 A.D.2d 949, 167 N.Y.S.2d 877; *Lugay Frocks, Inc. v. Joint Board Dressmakers' Union*, Sup. Ct., N.Y.L.J., July 1, 1958, p. 3, col. 1, *aff'd without opinion*, 6 A.D.2d 1060, 177 N.Y.S.2d 1008; *In re Pan American Trade Development Corp.*, Sup. Ct., N.Y.L.J., Aug. 21, 1957, p. 3, col. 1; *In re East Meadow Sanitation Service, Inc.*, Sup. Ct., N.Y.L.J., Feb. 25, 1958, p. 13, col. 1; *Matter of Grossman*, Sup. Ct., N.Y.L.J., January 21, 1959, p. 14, col. 2. See also 6 Corbin, Contracts §§1444, 1444A (1951, and Supp. 1959). We note that in *Robert Lawrence*, the Second Circuit examined the New York cases and found them expressive of a "restrictive . . . policy." 271 F.2d at 412. The court, however, considered neither the damages-rescission distinction, nor some of the more recent cases we have cited.

[15] The recovery of special damages for the limited purpose of putting the defrauded party back in as good a position as he occupied before entering into the contract may be awarded in connection with, and in addition to, rescission and restitution. This type of recovery is permitted by statute in New York, N. Y. Civ. Prac. Act, §112-c, and by the better practice in other states. See study contained in the 1941 Report of the Law Revision Commission, N.Y. Legis. Doc. (1941) No. 65(L), pp. 291-314.

terminated (as with a "rescission" based on a total breach), but is abrogated and undone from the beginning. See Black, Rescission of Contracts and Cancellation of Written Instruments §1 (2d ed. 1929); 2 Restatement, Contracts §349, Comment *a* (1932). With this in mind, we must determine what kind of rescission it is that Commonwealth wants, and to what kind, if any, it is entitled. The principal thrust of the complaint, the pertinent parts of which were set forth above, appears to be a tort action for damages. To this claim is appended a demand for: ". . . and (b) such rescission . . . as may be just and equitable. . . ." These plainly are not alternative claims, only one of which is intended to be carried through to judgment. Nor can they be claims for cumulative relief under which Commonwealth both affirms the contract and receives damages, and at the same time rescinds the contract and gets restitution. Such double recovery is nowhere allowed. The claim, therefore, must be interpreted as either for damages for deceit based upon an affirmance of part of the contract, together with rescission of part of the contract; or it must be for an entire rescission, together with such special damages as are necessary to make Commonwealth whole. On the face of the complaint, the first construction seems the proper one. The initial prayer asks for money damages almost double in amount what Commonwealth paid to Lummus, "plus other sums as yet undetermined." In addition, Commonwealth indicates no intent to return any part of the refinery. Such claims suggest an affirmance of the contracts. We note that in both Judge Magruder's order of June 19, and Judge Ruiz Nazario's order of July 20, Com-

monwealth's claim is termed as one for "damages," and its motion for a stay of arbitration as having been filed "in the present tort case." Commonwealth nowhere criticizes these characterizations as inaccurate. The prayer which follows, for "such rescission . . . as may be just and equitable," has the appearance of a mere claim for partial rescission appended upon the damage action. If partial rescission is what is sought, presumably it is of the provisions for arbitration. No other division is suggested. However, there cannot be a partial rescission. It is fundamental that a single agreement cannot be rescinded in part and affirmed in part. 2 Restatement, Contracts §487 (1932); 5 Williston, Contracts §1525 at p. 4271 (Rev. ed. 1937); *In re Miselman*, 2 Cir., 1939, 105 F.2d 995, 998; *Merry Realty Co.* v. *Shamokin & Hollis Real Estate Co.*, 1921, 230 N. Y. 316, 323, 130 N.E. 306, 308. Commonwealth cannot first ask us to consider the contracts as entire and indivisible for the purpose of making the arbitration clauses voidable by virtue of fraud relating to the principal agreements, and then seek to treat the provisions as separable so as to affirm part and rescind the rest.

Our construction that no rescission of the entire contracts was intended is further supported by certain statements in Commonwealth's brief. A party who seeks restitution is, of course, normally required to make restoration of the benefits received, in specie, so that the other party, as well, can be restored to the status quo so far as possible.[16] This is the logical consequence of the action, which disaffirms the con-

[16] For the sake of clarity, the term, "restitution" is used to denote the relief sought by the defrauded party, and the term "restoration" used to denote the return by the defrauded party of what he has received.

tract and returns to the defrauded party whatever he has parted with. But when faced with this prospect, Commonwealth states: "Lummus would now suggest that even if plaintiff was induced to place its economic future in Lummus' hands by fraud, Commonwealth is now bound to tender back substantially its entire business assets, its refineries, as a condition to rescinding the fraudulently induced contracts. In other words, in order to rescind Commonwealth must go out of business."[17] The implication of this is clear—Commonwealth has no wish to make restoration and go out of business. But if a party that has acquired a business wishes rescission, this is exactly what it must do.

Although the requirement of restoration in specie admits of a number of exceptions, most of these are of no conceivable relevancy here.[18] Certainly no exception is predicated on a choice by the defrauded party not to restore. If he does not care to restore, he should not elect to rescind. We recognize, of course, that restoration in money rather than in specie is permitted in certain instances where specific restoration is "impossible." It is to be noted that there is nothing in the record to indicate to what extent such restoration is in fact impossible. Passing this, and the important fact that Commonwealth appears

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[17] We do not construe this protest as meaning that Commonwealth simply does not wish to make a tender, and go out of business now, as a condition precedent to litigating. Lummus made no such suggestion, nor does the law so require. See, *e.g.*, N.Y. Civ. Prac. Act, §112-g; 1946 Report of the Law Revision Commission, N.Y. Legis. Doc. (1946) No. 65(B).

[18] See Restatement, Restitution §§65-66 (1937); Patterson, Restoration of Benefits Received By One Entitled to Avoid a

not to wish to restore even that which it might be able to, we do not believe this to be a proper case for such substituted restoration. We will assume that "if specific restoration became impossible before the party seeking restitution knew the facts and had an opportunity to act thereon, restitution is granted upon the payment of value or the imposition of conditions *if justice cannot otherwise be done*. . . ." Restatement, Restitution §66(3).[19] This limited exception is not incompatible with our view that for a party to retain a valuable res (other than money or fungible goods) and make some "compensatory" credit or adjustment, is contrary to the entire concept of rescission and restitution. It is significant that we have nowhere found a case where a party has succeeded in effecting rescission, and has at the same time retained *in its own possession* all of the very res which constituted the tendered performance of the other side. Even assuming that such a result might be allowed "if justice cannot otherwise be done," we do not believe that a desire to avoid arbitration constitutes such an imperative where nothing else in the case suggests that rescission and restitution are necessary to afford Commonwealth compensation for its injury.

Transaction, 1946 Report of the Law Revision Commission, N.Y. Legis. Doc. (1946) No. 65(B), pp. 71-77; 5 Williston, Contracts §§1529-30 (Rev. ed. 1937); 5 Corbin, Contracts §1114 (1951); Note, 29 Colum. L. Rev. 791 (1929), 32 Mich. L. Rev. 550 (1934).

[19] This rule is in fact given as an exception, to be applied in the case of things other than chattels, to the more general rule in the Restatement that with regard to non-fungible chattels rescission cannot be had if substantial restoration in specie is not possible. We believe this may be too stringent, and therefore assume the more flexible rule quoted. We refer to the Restatement because we have found no cases, either in New York or in any other jurisdiction, which we consider to be in point.

To allow Commonwealth to rescind and to keep the fruits of the contracts by permitting it to make substituted restoration would be just another way of allowing it to rescind merely the arbitration clauses, the very part as to which there was no fraud.

There is an additional reason why Commonwealth could not effect a rescission of the principal agreements. "An unreasonable delay in manifesting an avoidance of a transaction after the acquisition of knowledge of the facts terminates the power of rescission for fraud . . . if the interests of the transferee . . . are harmed or were likely to be harmed by such delay." Restatement, Restitution §64. See also *id.* §68; 2 Restatement, Contracts §§483-84. In January 1956, an independent consulting engineer employed by Commonwealth questioned a major design feature, and stated that one of Lummus' estimates was not realistic; in October 1956, Commonwealth informed Lummus of its fears as to "possible basic inadequacies in design or construction"; and by November 1957, or earlier, Commonwealth had received the Kellogg report, with its reference to "grossly optimistic" figures, and its detailed analysis of the refinery. The record is bare as to any subsequent occurrence which threw any new light on the situation. The parties met frequently to discuss their various claims and what should be done. Not, however, until after Lummus had demanded arbitration in April 1959, did Commonwealth say anything about rescinding any agreement, or make any mention of fraud. On the contrary, as late as January 1959, Commonwealth was expressly calling upon Lummus

to meet its obligations under the contracts,[20] and at least implicitly maintained that position until the institution of this suit. Throughout this period Lummus spent, according to an affidavit, "huge amounts of money, effort and time," which it asserts it would not have spent had it understood there was to be a claim for rescission.

Although Commonwealth filed a number of affidavits on the present motions, some of them lengthy, it has not alleged, even in conclusory form, that it acquired any new knowledge later than in the fall of 1957 by means of which it "discovered" its right to rescind. In reply to Lummus' contention that it must be taken to have affirmed the contracts well before May 1959, Commonwealth states in its brief that throughout the summer and fall of 1958 the parties were discussing the performance tests called for by the contracts, and that "as late as January 13, 1959 Commonwealth was demanding action with respect to the replacement of pumps at the refinery. . . ." These and other similar matters are described in its brief as "*significant facts indicating a recent date of discovery* of the true nature of Lummus' contract. . . ." (ital. suppl.)

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[20] For example in a letter of January 15, 1959, Commonwealth's secretary and general counsel stated that although Commonwealth felt that the acceptance-test provisions of the contracts were no longer applicable, "We did not and do not mean that we think Lummus is released from any of its contractual liabilities to this Company. . . . [Y]ou are not relieved of your obligations to perform the required services under the contract." Similarly, when Lummus informed Commonwealth in February 1959 that it was withdrawing four operators at the refinery, Commonwealth's president replied, "So far as we are concerned, these operators are at the refinery under the construction contracts, but, being your employees, are of course subject to your supervision and control."

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960

What seems to us more significant is that there is nowhere any affirmation that the discovery was, in truth, recent. The facts alleged as "indicating" that it was, indicate no more than that Commonwealth did not choose to rescind, as distinguished from not knowing that it had a right to. The closest that Commonwealth comes is a statement that "the very magnitude and technical complexity of the refineries made complete comprehension of what had occurred belated and difficult." Even this, however, is in its brief, not in *any affidavit. It then adds,* "The necessarily brief time available to make the presentation to the Court below precluded, of course, the most exhaustive demonstration of Commonwealth's position." Having in mind that the record before us occupies 588 printed pages, and was evidently even larger below, we can hardly take counsel's apology as a substitute for the total absence from the record of any factual, or even conclusory, allegations on this subject. The only thing that the record shows to be newly discovered is an antipathy to arbitration.

If Commonwealth were pursuing with vigor an evident attempt to rescind the principal agreements, and had presented some, even slightly plausible, excuse for not having made its claim sooner, we might be disposed to say that an issue of fact had been made out. Instead, however, after opportunity to make a full presentation, there appears a consistent pattern of an attempt to defeat arbitration by asserting fraud as to the principal agreements, and then seeking to rescind solely the agreements to arbitrate. Commonwealth cannot blow hot and cold in the same breath.

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960

If the agreements to arbitrate are separable from the principal agreements no ground has been shown for their avoidance. If they are not separable, we hold it has shown no basis for rescission at all.[21]

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[21] In its complaint, Commonwealth asked for either rescission of the contracts under New York law, or, alternatively, "a declaration as to their inexistence under the laws of the Commonwealth of Puerto Rico." Although Commonwealth has not briefed this latter, we have given it some attention. An action for a declaration of inexistence is the proper remedy where any or all of the three essential requisites for a contract, including consent, is wholly lacking, as in a simulated contract. See §1213 of the Civil Code, 31 L.P.R.A. §3391; *Gonzalez* v. *Fumero*, 1928, 38 P.R.R. 497; *Logia Caballeros del Plata* v. *Garcia*, 1944, 63 P.R.R. 279; *Guzman* v. *Guzman*, 1955, 78 P.R.R. 640. There is no period of prescription (statute of limitations) for such an action. *Guzman* v. *Guzman*, *supra*, at 649. However, if a contract contains the necessary effectuating requisites, "although tainted with defect or vice," there is nonetheless a contract "because there is the possibility of confirming the same and this cures the defect." *Gonzalez* v. *Fumero*, *supra*, at 507. In other words, the contract exists but is voidable. One form of defect in the consent may be that it was obtained by deceit. Civil Code, §1217, 31 L.P.R.A. §3404, which includes what we have referred to as fraud in the inducement. Civil Code, §1221, 31 L.P.R.A. §3408; *Rivera* v. *Heirs of Diaz*, 1949, 70 P.R.R. 168; *Cruz* v. *Water Resources Authority*, 1954, 76 P.R.R. 291. If the deceit is "serious" (*dolo causante*), Civil Code, §1222, 31 L.P.R.A. §3409, it will give rise to an action for nullity under §1252 of the Code, 31 L.P.R.A. §3521. (Sections 1242-51 of the Code, 31 L.P.R.A. §§3491-3509, also provide for what in Puerto Rico is termed an action for "rescission," but this is a different matter, which is not relevant here. See *Municipality of Ponce* v. *Vidal*, 1945, 65 P.R.R. 346.) We think it clear that it is the action for a declaration of nullity, and not of inexistence, that would be Commonwealth's remedy under the law of Puerto Rico. See *Agostini* v. *Philippi*, 1910, 16 P.R.R. 630. The Code further provides for the restoration, upon nullification, of "the things which have been the object of the contract with their fruits, and the value with its interest . . ." subject to certain other sections not here applicable. Civil Code, §1255, 31 L.P.R.A. §3514. The only case we have found permitting restoration in money rather than in specie is, on its facts, well within the exceptions recognized by common-law jurisdictions. *Fuertes & Co.* v. *Colon*, 1926,

Opinion of Court of Appeals for the First Circuit (Aldrich, J.), Filed June 16, 1960

Since Commonwealth failed to raise a substantial issue as to the making or the existence of the contracts, it was not entitled to a preliminary stay of the arbitration proceedings. Similarly, since the preliminary injunction against Lummus rested on the granting of the preliminary stay it, too, must be vacated. No other reason for staying the arbitration has been shown. Commonwealth has not contended that Lummus' claim does not constitute an arbitrable issue within the broad provisions of the clause here in question. We believe that this question, if there could be one, is therefore foreclosed to it. We also rule that as a matter of construction Commonwealth's claims are within the scope of the arbitration clause. We have seen that under the New York cases the issue of fraud is not in itself non-arbitrable. We think that

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35 P.R.R. 269. The Civil Code also provides for the ratification or confirmation of a contract by conduct inconsistent with an intent to seek nullification. Civil Code, §§1261-65, 31 L.P.R.A. §3520,24; *Succ. Del Moral v. Mayaguez L.P. & Ice Co.*, 1939, 54 P.R.R. 141, 149. In major respects, therefore, we find the civil law to be parallel to the common law. The only difference we have discovered is one which would affect Commonwealth adversely. That is, that the action for a declaration of nullity based on deceit is subject to an extremely rigid statute of limitations of four years "from the date of the consummation of the contract." Civil Code, §1253, 31 L.P.R.A. 3512. Apparently the running of the statute is not tolled during the period when the injured party is not aware of the deceit. See *Rivera v. Heirs of Diaz*, *supra*, at 199 (concurring opinion); *Guzman v. Guzman*, *supra*, at 619. Once the action is barred, the contract is deemed valid for all purposes. *Agostini v. Philopp*, *supra*. It would then follow that Commonwealth could not nullify the first contract, which was executed July 8, 1954, effective December 3, 1953. We do not pursue the question of whether a court in Puerto Rico would also apply this statute of limitations to a cause of action which might be thought to be governed by New York law. See Restatement, Conflict of Laws §317 (1934); Restatement 2d, Conflict of Laws, Tentative Draft No. 6, 1960, §334b.

the clause here—"any controversy or claim arising out of or relating to this Agreement . . ."—is sufficiently broad to include a claim for damages based on fraudulent inducement, particularly when many of the fundamental issues involved are basically the same as would have been raised had the claim been cast as one for breach of contract. See *M. W. Kellogg Co.* v. *Monsanto Chemical Co., supra.*[22] As no motion to compel arbitration is before it, we believe that the proper course is for the district court to stay its own proceedings. See *Landis* v. *North American Co.*, 1936, 299 U.S. 248, 254. If all the issues between the parties are arbitrated, or otherwise disposed of, this suit can eventually be dismissed. If, for some reason, no such solution occurs, Commonwealth can then pursue its action.

A question remains as to the appeals from the orders of June 19 and July 17. These orders expired by their terms when the court entered its order of

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[22] *Wrap-Veritier Corp.* v. *Plotnick, supra*, is not to the contrary, as the clause there was quite different. Nor is the statement in *Lipman* v. *Hauser Shellac Co., supra* "that all acts of the parties subsequent to the making of the contract . . . lie exclusively within the jurisdiction of the arbitrators." The court was there holding that under a clause reading "any and all controversies in connection with, and or arising out of, this contract," the defense of cancellation was for the arbitrators. Viewed in the light of that holding the court was expressing a broad, not a restrictive, arbitral jurisdiction. As the court went on to say, "this language would appear sufficiently broad to express the intention of the parties to include within the exclusive jurisdiction of the arbitrators as a general rule all acts by the parties giving rise to issues in relation to the contract, except the making thereof." 289 N.Y. at 80, 43 N.E.2d at 819. Since we have ruled out rescission in the case at bar, the "making of the contract" is not in issue in the sense used by the court in *Lipman*.

July 20. If we were to dismiss these appeals as moot, conceivably some contention of *res judicata* might be predicated on what had been determined therein, see *United States* v. *Mausingwear, Inc.*, 1950, 340 U.S. 36; *Kelaghan* v. *Industrial Trust Co.*, 1 Cir., 1954, 211 F.2d 134, notably, perhaps, issues involved in the order of July 17 which we are not deciding. While the likelihood of this may be remote, in view of the fact that the same errors that cause us to vacate the order of July 20 "infected" these earlier orders, we will make a similar disposition.

Judgments will be entered vacating the orders of the District Court.

Opinion of Court of Appeals for the First Circuit on Petition for Rehearing (Aldrich, J.), Filed August 10, 1960

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5552.

THE LUMMUS COMPANY,
Defendant-Appellant,

v.

COMMONWEALTH OIL REFINING COMPANY, INC.,
Plaintiff-Appellee;

No. 5553.

SAME v. SAME; and

No. 5554.

SAME v. SAME.

Appeal from the United States District Court
For the District of Puerto Rico.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

JOHN T. CAHILL, with whom LAWRENCE J. MCKAY, RAYMOND L. FALLS, JR., HERBERT S. MCCONNELL,

Opinion of Court of Appeals for the First Circuit on Petition for Rehearing (Aldrich, J.), Filed August 10, 1960

PUTNAM, BELL, SANTRY & RAY, CAHILL, GORDON, REINDELL & OHL, and MCCONNELL, VALDES & KELLEY, were on brief, for appellant.

JOHN F. DOOLING, JR., with whom RICHARD DEY, MANNING, MILTON POLLACK, HAMILTON F. POTTER, JR., JEFFREY A. FILLMAN, RUBEN RODRIGUEZ-ANTONGIORGI, SULLIVAN & CROMWELL and FIDDLER, GONZALEZ, GUILLEMARD & RODRIGUEZ were on the brief for appellee.

OPINION OF THE COURT

On Petition for Rehearing
August 10, 1960.

ALDRICH, *Circuit Judge*. Commonwealth has petitioned for rehearing, alleging that the court has "materially misapprehended" the record, and that it has decided questions on which the district court was to take "further evidence." It first alleges that we could not decide, meaning should not have decided, whether restoration in specie was required. It points out that some things in fact could not be restored, and that others, not having been acquired from Lummus, did not have to be (Lummus having acted, in purchasing and paying for certain material, as Commonwealth's agent, and not as a vendor). It adds that the time was not ripe in any event to determine what restoration was called for, and charges the court with having "conclude[d] that restoration of the entire refineries be required." This is not a correct reading

of our opinion. Rather, we decided that Commonwealth was not really pursuing a restitutionary remedy —a deduction there has been no serious attempt to refute—but that the true nature of the action was an endeavor to recover damages while rescinding the arbitration agreement alone. Possibly we did not adequately express our views on the New York law. Although we recognize that New York may regard an arbitration clause as falling upon a rescission of the principal agreement, we do not believe that it would carry this to the point of permitting (where the fraud in no way related to it) what in effect would be a true rescission of the arbitration clause only. The petition for rehearing confirms our belief that this is what Commonwealth is seeking.

The next portion of the petition we find somewhat extraordinary. Having, as we pointed out, alleged fraud in the district court in the vaguest and most general of terms, Commonwealth now submits an affidavit as to what, specifically, at least in part, the fraud consisted. Then it submits an affidavit that this particular matter was discovered only in March 1959. It asserts that these affidavits should now be accepted to "preserve the court's appellate jurisdiction." There is no explanation why they were not submitted earlier, except some suggestion that the issue of the date of discovery was not ripe. However, Commonwealth's original brief did not suggest this issue was not ripe, but contended, quite ineffectually, that the record was adequate. We have devoted a sizable portion of the past several months to the

complexities of this unusually difficult case. If we have erred on the record before us, we would wish to reconsider. But we have no desire to consider a new record at this stage. The affidavits will not be received.

Commonwealth's last contention is that, "Since the Court below was the first court to take hold of this matter and is the only court in which Commonwealth's claims are pending, the District Court should not stay its own proceedings unless and until Lummus establishes that Commonwealth's claims are arbitrable under the terms of the arbitration clause." What Commonwealth has partly in mind is that the arbitration clause excludes the arbitration of "claims or damages for which either party has contracts of insurance protecting their respective interest." Commonwealth fears that our statement in footnote 1, ("No issue has been raised with respect to the last sentence and we assume it has no applicability to the claims here involved."), will foreclose it from contending that some of its claims against Lummus are not arbitrable because Lummus is protected by insurance. We of course had no such intention. We merely assumed that there was no insurance because no point was made of it. But Commonwealth goes further. It alleges that we also, in effect, decided this issue when we stated that the court below should now stay the proceedings before it, apparently overlooking the last two sentences of the penultimate paragraph of the opinion.

Basically, Commonwealth contends that the court could not stay its proceedings without a motion to

that effect by Lummus. It is true that Lummus could have made such a motion as one of the means by which it could compel arbitration. But Lummus already has an action pending in New York to accomplish this very thing. The stay that we indicated is not the equivalent of the stay which would be entered upon a motion for a stay of the action under an arbitration statute. Such a stay would indeed settle all questions of arbitrability. The stay we suggested is based on the belief that there should be no further duplication of litigation in two Federal courts of concurrent jurisdiction. We intimated at the beginning of our opinion that there would have been sound reasons for the court below to have deferred initially to the New York court. Clearly now that certain issues in the case have been decided,* we see no reason for the court below to remain as the court which will supervise whatever arbitration is to be had. Under the terms of the arbitration agreement arbitration will take place in New York. New York law will be controlling. We think that a court in New York should supervise the arbitration.

The petition for rehearing is denied.

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* It seems late for Commonwealth to suggest that the general scope of the arbitration clause was not before the court. But we have not decided that some special exception might not exist, of which damage claims covered by insurance is an obvious example.

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 146-246

In the Matter

of

The Arbitration of Certain Differences Between
THE LUMMUS COMPANY,

Petitioner,

and

COMMONWEALTH OIL REFINING COMPANY, INC.,

Respondent.

APPEARANCES:

CAHILL, GORDON, REINDEL & OHL, Esqs., of New York, N. Y., Attorneys for Petitioner, LAWRENCE J. McKAY, Esq., RAYMOND L. FALLS, JR., Esq., THOMAS F. CURNIN, Esq., JOSEPH M. McLAUGHLIN, Esq., Of Counsel.

SULLIVAN & CROMWELL, Esqs., of New York, N. Y., Attorneys for Respondent, RICHARD DEY. MANNING, Esq., RUBEN RODRIGUEZ-ANTONGIORGI, Esq., MILTON POLLACK, Esq., JOHN F. DOOLING, JR., Esq., Of Counsel.

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

DAWSON, D. J.:

Commonwealth Oil Refining Company, Inc. (hereinafter referred to as "Commonwealth") moved by order to have the Lummus Company (hereinafter referred to as "Lummus") show cause why all proceedings in connection with the arbitration demanded by Lummus should not be stayed until after Lummus has brought on for hearing its pending petition to compel arbitration and until the determination thereof. Alternatively, Lummus was ordered to show cause why an immediate trial of the issues of arbitrability and the making of the alleged contracts should not be had. This motion was argued on February 28, 1961. Decision was reserved until after a motion to remand, which was then *sub judice* before Judge Weinfeld, was decided.

A HISTORY OF THE PROCEEDINGS

The problems confronting the Court arise out of two contracts between Lummus and Commonwealth dated July 8, 1954, and March 14, 1956. Under these contracts Lummus was to construct oil refining facilities for Commonwealth in Puerto Rico for which Commonwealth paid Lummus more than $32,000,000. Commonwealth alleges that it entered into these contracts on the basis of guaranties given by Lummus as to anticipated net income and productive capacity. After three years of operation, instead of realizing the expected income, Commonwealth accumulated

losses allegedly amounting to over $14,000,000. Commonwealth charges that these "losses were caused by Lummus' fraudulent and misleading representations as to the yield capabilities, operating costs and resulting profits which induced Commonwealth to enter into the two challenged contracts." (Commonwealth's memorandum in support of application for stay, pages 3 and 4).

Negotiations attempting to reconcile the differences between the parties were conducted in 1959. In February and March of that year, Commonwealth retained Purvin & Gertz, Inc., as consulting engineers to ascertain the amount of their claims against Lummus. Between April 29th and May 4th, Lummus mailed Commonwealth a demand for arbitration, dated April 27, 1959, claiming $4,697,997.85, with interest, and demanding "a determination of any set-offs or counterclaims against the undersigned which Commonwealth may assert." On May 4, 1959, enforced with the Purvin & Gertz studies, Commonwealth filed a complaint in the District Court of Puerto Rico seeking $60,000,000 as damages caused by Lummus' fraud, rescission, and other relief. Simultaneously Commonwealth filed a motion in the Puerto Rican court to stay the arbitration demanded by Lummus.

On or about May 20, 1959, Lummus commenced an action in the Supreme Court of New York County seeking to compel Commonwealth to proceed with arbitration. This petition was removed to the Southern District on May 25th. The details of the play and counter-play proceedings engaged in by the parties

immediately thereafter are set forth in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F. 2d 915, 919 (1st Cir. 1960) and need not be reviewed here.

The next action having pertinence to this proceeding took place on July 20, 1959, when Judge Ruiz-Nazario entered an order staying the arbitration "until this Court enters its order finally determining whether there are valid and existing arbitration agreements . . ." and granting the preliminary injunction enjoining Lummus from taking any steps in furtherance of the arbitration in the Southern District of New York or elsewhere.

Judge Ruiz-Nazario's order was appealed to the First Circuit. An opinion was rendered on June 16, 1960, in which the Court of Appeals vacated the District Court orders. The Circuit suggested that the District of Puerto Rico, though it had been the first court to pass on the action, stay its own proceedings to permit a resolution of the matters in New York. On rehearing the First Circuit's position was clarified. The court said that it had decided that Commonwealth, in its $60,000,000 Puerto Rican action, was not really pursuing a restitutionary remedy, that the true nature of the action was one for damages and rescission of the arbitration agreement alone. The opinion on rehearing explains the stay which it suggested as follows:

> "The stay that we indicated is not the equivalent of the stay which would be entered upon a motion for a stay of the action under an arbitration statute. Such a stay would indeed settle all

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

> questions of arbitrability. The stay we suggested is based on the belief that there should be no further duplication of litigation in two Federal courts of concurrent jurisdiction. We intimated at the beginning of our opinion that there would have been sound reasons for the court below to have deferred initially to the New York court. . . . Under the terms of the arbitration agreement arbitration will take place in New York. New York law will be controlling. We think that a court in New York should supervise the arbitration." 280 F. 2d at 933.

Thereafter the Puerto Rican district court entered an order on mandate staying further proceedings "until the entry of a final judgment or order by a Court of competent jurisdiction in the State of New York determining the issues of the arbitrability of the claims between the parties and until the making, after such determination, of such further order of this Court respecting the stay or continuance of this action in whole or in part as is appropriate in the light of the final determination of such court of competent jurisdiction in New York." This order was signed by Judge Ruiz-Nazario on January 3, 1961. There are no additional proceedings currently taking place in either the First Circuit or the District of Puerto Rico.

A motion to remand the action to the State court was argued before Judge Weinfeld on January 31, 1961. In an opinion dated June 2, 1961, the motion

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

to remand was denied. Judge Weinfeld held that Puerto Rico is a "State" for purposes of diversity jurisdiction and that its inclusion as a State under section 1332(d) of Title 28, United States Code, was not beyond the constitutional competence of Congress. In addition the court held that section 1450 of the New York Civil Practice Act should be applied. Contentions that this statute provides a "peculiar" remedy and that section 1450 is merely procedural and thus not binding on the federal court were rejected. After stating that "the essential inquiry is whether it would 'significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court' ", Judge Weinfeld concluded that the New York Arbitration Law was substantive and thus must be applied by the federal court in this action.

On February 3, 1961, Commonwealth brought on an order, returnable on February 7th, demanding that Lummus show cause why proceedings in connection with the arbitration should not be stayed until determination of the motion to remand and until the determination of the motion now before this Court. Judge Bryan, in a memorandum opinion dated February 14, 1961, held that "proceedings before the American Arbitration Association will be stayed until the determination of the motion for remand, and in the event that such motion is denied, until the respondent's motion [this motion] addressed to the petition to compel arbitration is heard."

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

The Issue Before This Court

At the present juncture this Court must decide whether to issue a temporary restraining order staying arbitration proceedings until Lummus has brought on for hearing its pending motion to compel arbitration and until the determination of that motion. In the alternative this Court has been asked to stay all proceedings and order an immediate trial of the controversy concerning the making of the contracts and the arbitrability of the issues in conflict. If this Court denies Commonwealth's application, the American Arbitration Association will proceed with the arbitration and with a determination of the claims.[9]

The Applicable Law

The law to be applied in this action, as intimated by the parties and held by Judge Weinfeld, is New York law, specifically, the New York Arbitration Statute. The provisions with which the Court is now concerned are those of Section 1450.

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[9] ". . . the Administrator must reiterate its position that as an administrative, non-judicial agency, we might not determine whether or not this matter is arbitrable. Further, in line with the Association's policy, as determined by its Arbitration Law Committee . . . the Association will not require that a motion to compel arbitration be made as a prerequisite to our administration and the Association will proceed with the administration of the arbitration, in the absence of an agreement between the parties to the contrary or an order of the court staying the arbitration." Letter of Wallace Bock, Director, Commercial Tribunals of the American Arbitration Association, dated January 12, 1961.

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

"§1450. *Remedy in case of default.*

. . . A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration . . . may petition the supreme court . . . for an order directing that such arbitration proceed in the manner provided for in such contract or submission. . . . The court . . . shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith, the court . . . hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission.

If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the court . . . shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the court . . . shall hear and determine such issue. . . . Whenever an immediate trial is ordered the order therefor shall provide that if the court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration was made . . . and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order shall provide that if the court or jury . . . find that there was no such

contract or submission or failure to comply therewith then the proceeding shall be dismissed."

Thus under section 1450 the judge before whom the petition to compel arbitration is brought must order such arbitration unless it appears that a substantial issue as to the making of the contract or submission or the failure to comply therewith exists. In the latter event, an immediate trial should be ordered.

Conclusions

Determination of this controversy has lagged for more than two years. The granting of a temporary stay, as the sole relief on this motion, would serve only to further delay a resolution. A petition to compel arbitration is now pending in this court. The ultimate issues raised by the parties, including allegations of fraud and the non-existence of an arbitrable issue, should be conclusively determined as quickly as possible. The proper forum for such a determination in this case, in its present posture, is a trial and final action on the petition to compel arbitration. At the same time, if the court grants no stay, the American Arbitration Association will proceed to arbitration of the controversy. See footnote 1, *supra*. If later it is held that no arbitrable issue existed, or that the arbitration agreement was induced by fraud, then the efforts expended on an arbitration of the controversy would be wasted.

Opinion of District Court for the Southern District of New York Staying Arbitration Pending Trial (Dawson, J.), Dated June 7, 1961

That a substantial issue has been raised as to the making of the contract becomes abundantly clear from an analysis and review of the allegations and counter-allegations of the parties. If this action were still in the State court, under section 1450, the Supreme Court judge considering the petition would set the action down for an immediate trial. Because of the unique machinery of the Southern District court, the petition is not before a single judge but before the court itself. In this court, where a judge is assigned to a specific part as a result of the exigencies of efficiency, a single case may come before more than one judge. Separate aspects of this case, for example, have already been ruled on by three members of this court.

In accordance with section 1450, and in fulfillment of the intent of that section, a substantial issue has been raised and the matter should be set down for an immediate trial. The petition is before the court and will be tried by the court; more particularly, by a judge sitting in the civil trial part, jury (if that is demanded) or non-jury (if a jury is waived). It is ordered that the case be placed at the head of the ready day calendar for trial in October. Pending determination of the trial, all proceedings for arbitration shall be stayed.

Submit order.

Dated: New York, N. Y.
June 7, 1961.

s/ ARCHIE O. DAWSON
U. S. D. J.

Order of District Court for the Southern District of New York Directing a Trial of Issues Involved (Dawson, J.), Dated June 22, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 146-246

Order

In the Matter

of

The Arbitration of Certain Differences Between
THE LUMMUS COMPANY,

Petitioner,

and

COMMONWEALTH OIL REFINING COMPANY, INC.,

Respondent.

Respondent, Commonwealth Oil Refining Company, Inc., having moved by Order to Show Cause dated January 18, 1961 for an order staying all proceedings in connection with the arbitration demanded by petitioner, The Lummus Company, until petitioner has duly brought on for hearing its pending motion to compel arbitration and until the said motion has been determined, or alternatively, staying all proceedings in connection with the arbitration demanded by petitioner, The Lummus Company, and directing an immediate trial of the issues as to the making of the alleged contracts containing arbitration clauses

Order of District Court for the Southern District of New York Directing a Trial of the Issues Involved (Dawson, J.), Dated June 22, 1961

and respondent's alleged failure to comply with the alleged contracts to arbitrate, and for further relief;

And having heard Sullivan & Cromwell, attorneys for respondent, by John F. Dooling, Jr. in support of said motion, and Messrs. Cahill, Gordon, Reindel & Ohl, attorneys for petitioner, by Lawrence J. McKay, Esq. in opposition thereto, and due deliberation having been had, and the Court having filed its opinion herein dated June 7, 1961;

And it appearing to the satisfaction of the Court (a) that a substantial dispute has arisen as to the making of the contracts and the arbitrability of the issues in conflict; and (b) that unless a stay is granted, the American Arbitration Association will proceed to arbitration of the controversy and, if later it is held that no arbitrable issue existed, or that the arbitration agreements were induced by fraud, the efforts expended on an arbitration of the controversy would be wasted, it is hereby

ORDERED that the motion of respondent, Commonwealth Oil Refining Company, Inc., be and the same hereby is granted to the extent of directing a trial of the issues concerning the making of the contracts of July 8, 1954 and March 14, 1956, and the arbitrability of the issues in conflict between the parties, as provided below, and staying all proceedings in connection with the arbitration demanded by the Demand for Arbitration of petitioner, The Lummus Company, dated April 27, 1959 pending determination of the said trial; and it is further

Order of District Court for the Southern District of New York Directing a Trial of the Issues Involved (Dawson, J.), Dated June 22, 1961

ORDERED that the case be placed by the Deputy Clerk for Calendars at the head of the Ready Day Calendar of this Court of October 16, 1961, for the trial of "Jury Other Than Personal Injury and Death Actions" if a jury is demanded within five days after the entry of this order, or on the said Ready Day Calendar for the trial of "Non-Jury Other Than Personal Injury and Death Actions" if no jury is demanded.

Dated, New York, New York, June 22nd, 1961.

/s/ ARCHIE O. DAWSON,
United States District Judge.

Opinion of Court of Appeals for the Second Circuit (Friendly, J.), Dated November 14, 1961

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 93—September Term, 1961.

(Argued September 25, 1961 Decided November 14, 1961.)

Docket Nos. 27100 & 27110

THE LUMMUS COMPANY,

Petitioner,

—v.—

COMMONWEALTH OIL REFINING COMPANY, INC.,

Respondent.

THE LUMMUS COMPANY,

Petitioner,

—v.—

THE HONORABLE ARCHIE O. DAWSON,

Respondent.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and SMITH, *Circuit Judges*.

Opinion of Court of Appeals for the Second Circuit (Friendly, J.), Dated November 14, 1961

Appeal from and petition for mandamus to vacate an order of the District Court for the Southern District of New York, Archie O. Dawson, *Judge*, granting appellee's motion for a stay of arbitration and ordering trial of certain issues of arbitrability. Appeal dismissed for lack of appellate jurisdiction; petition for mandamus granted.

JOHN T. CAHILL, New York, New York (Cahill, Gordon, Reindel & Ohl, Lawrence J. McKay, Raymond L. Falls, Jr., Thomas F. Curnin, on brief), *for Petitioner*.

JOHN F. DOOLING, JR., New York, New York (Sullivan & Cromwell, Richard DeY. Manning, Milton Pollack, Ruben Rodriquez-Antongiorgi, on brief), *for Respondent, Commonwealth Oil Refining Company, Inc.*

FRIENDLY, *Circuit Judge*:

An appeal and an alternative petition for mandamus bring us a host of questions in this sizable litigation, now well into its third year without even an approach to the merits. Much of the previous history is told in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F. 2d 915 (1 Cir.), rehearing denied, 280 F. 2d 932, cert. denied, 364 U. S. 911 (1960) [sometimes hereafter "the First Circuit decision"], and in Judge Weinfeld's opinion denying Lummus' motion to remand, 195 F. Supp. 47 (S. D. N. Y. 1961). Nevertheless a brief discussion of the background is here required.

Opinion of Court of Appeals for the Second Circuit (Friendly, J.), Dated November 14, 1961

The controversy between Lummus and Commonwealth stems from two contracts, one executed July 8, 1954, and the other March 14, 1956, wherein Lummus, a Delaware corporation, agreed to construct an initial and an expanded oil refinery in Puerto Rico for Commonwealth, a Puerto Rican corporation. Each contract contained an agreement to arbitrate, paragraph 25.1, which we quote in the margin.[1] The contracts provided they "shall be deemed to have been made, executed and delivered in New York"; however, they did not say they were to be governed by New York law.

Commonwealth having withhheld payment of large sums claimed by Lummus for services and materials, Lummus, on April 29, 1959, mailed a demand for arbitration of its claims, aggregating $4,697,997.85, and "any setoffs or counterclaims * * * which Commonwealth may assert." Commonwealth responded by commencing, in the District Court of Puerto Rico, an action for $60,000,000 and "other sums as yet undetermined" as damages for alleged fraudulent or negligent misrepresentations in the studies and projections prepared by Lummus prior to execution of the contracts; Commonwealth moved also, pursuant to 32 Laws of Puerto Rico (Ann.) §3204(4)(a), for a stay of the arbitration on the ground that the arbitration agree-

1 "Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association. This Agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in New York, U. S. A. It is agreed, however, that this Agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests."

ments "are invalid or do not exist by reason of" the alleged misrepresentations. May 20, Lummus moved in the New York state courts to compel arbitration pursuant to New York Civil Practice Act, §1450; Commonwealth removed that proceeding to the District Court for the Southern District. On the morning of May 29 counsel for Lummus notified New York counsel for Commonwealth that Lummus was about to move to enjoin Commonwealth from taking further proceedings in Puerto Rico pending disposition of the New York action, and intended to apply that afternoon for a temporary restraining order, a procedure which complied with the admonition of Judge Lumbard in *Arvida Corp.* v. *Sugarman*, 259 F. 2d 428, 429 (2 Cir. 1958). The virtue of Lummus' counsel was not rewarded; Commonwealth's Puerto Rico counsel immediately secured *ex parte* an order of the District Court there, temporarily restraining prosecution of the New York action. On July 20, after hearings, the District Court for Puerto Rico entered an "Order for Preliminary Injunction," containing extensive findings of fact and conclusions of law.[2] The Puerto Rico District Court found that "A substantial dispute has arisen and a substantial issue exists as between Commonwealth and Lummus as to whether there was fraud in the inducement of the contracts * * * which might make the consent of the parties unreal and nullify the whole contract including the arbitration clause"; that "The questions raised in the present

[2] Certain other proceedings in the District Court for Puerto Rico, not here material, are reported in 174 F. Supp. 485 and 175 F. Supp. 873.

case concerning the staying of the arbitration demanded by defendant Lummus are governed by the Arbitration-Law of Puerto Rico"; and that the court had the power, in its discretion, to enjoin any further steps or proceedings by Lummus in the Southern District or before the American Arbitration Association until such questions were determined by it. An order issued so enjoining Lummus "until this Court enters its order finally determining whether there are valid and existing arbitration agreements between the parties and whether the said arbitration so demanded should be permanently stayed."

An appeal by Lummus to the First Circuit resulted in a comprehensive opinion, written by Judge Aldrich, unanimously reversing this order of the District Court for Puerto Rico. The Court of Appeals indicated that, if it felt free to apply its own views, it would hold the arbitration clause broad enough to include a claim of fraud in the inducement, as this Court had held under the Federal Arbitration Act, 9 U. S. C. §§1-13, in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2 Cir. 1959), cert. granted, 362 U. S. 909, dismissed pursuant to stipulation, 364 U. S. 801 (1960), and has decided more recently in *In re Kinoshita & Co.*, 287 F. 2d 951 (2 Cir. 1961); however, the First Circuit felt bound to apply the law of New York. Taking that view, it held that a New York court would consider a claim of voidability based on fraud in the inducement of the entire contract, even though not related specifically to the agreement to arbitrate, in deciding whether to compel arbitration; however, Commonwealth had not asserted

any fraud peculiar to the agreement to arbitrate and its claim of rescission of the contracts in their entirety was inconsistent with its apparent unwillingness to return any part of the consideration—moreover, its attempt at rescission was not timely. The Court concluded, 280 F. 2d at 931, that "Since Commonwealth failed to raise a substantial issue as to the making or the existence of the contracts, it was not entitled to a preliminary stay of the arbitration proceedings" or to the preliminary injunction issued thereafter. The various injunctive orders were vacated and the District Court in Puerto Rico was directed to stay its own proceedings pending the arbitration in New York. Denial of rehearing in a further opinion[3] and denial of certiorari followed, after which the District Court for Puerto Rico took the action the First Circuit had directed.

The scene now shifts back to New York. On January 12, 1961, after a barrage of letters begun by Lummus and vigorously continued by Commonwealth, the American Arbitration Association advised it would proceed with the arbitration. A few days later Commonwealth moved in the Southern District to stay arbitration until Lummus' petition to compel it had been brought on for hearing or, in the alternative, pending a trial on issues of arbitrability. The issues proposed to be tried were fraud in the inducement of the contracts, a contention that certain of Lummus' claims did not arise under them, and the effect of the

[3] This stated, *inter alia*, "• • • now that certain issues in the case have been decided, we see no reason for the court below to remain as the court which will supervise whatever arbitration is to be had." 280 F. 2d at 933.

last sentence of the arbitration paragraph, relating to insurance. Lummus, evidently tiring of what had been its relatively passive role in the Federal arenas, moved to remand to the state court on numerous grounds set forth in Judge Weinfeld's opinion of June 2, 1961, 195 F. Supp. 47, denying its motion. June 8, Judge Dawson filed a memorandum directing a trial of arbitrability. He held that this was governed by New York law and "That a substantial issue has been raised as to the making of the contract"; his memorandum did not discuss Lummus' contention that any such issue had been disposed of by the First Circuit or refer to the other issues Commonwealth had raised. After denial of a motion by Lummus for reargument or alternatively for the inclusion of a certificate pursuant to 28 U. S. C. §1292(b), an order was entered granting Commonwealth's motion "to the extent of directing a trial of the issues concerning the making of the contracts of July 8, 1954 and March 14, 1956, and the arbitrability of the issues in conflict between the parties, * * * and staying all proceedings in connection with the arbitration demanded * * * pending determination of the said trial."

The last steps in this procedural marathon are that Lummus has appealed from this order; that Commonwealth has moved to dismiss for lack of appellate jurisdiction; and that Lummus has petitioned for mandamus if Commonwealth's motion to dismiss be granted.

Opinion of Court of Appeals for the Second Circuit (Friendly, J.), Dated November 14, 1961

(1) *Appealability.*

Plainly Judge Dawson's order is not a final judgment appealable under 28 U. S. C. §1291, as an order dismissing Lummus' petition or an order directing arbitration would have been, *Farr & Co. v. Cia. Intercontinental de Navegacion*, 243 F. 2d 342 (2 Cir. 1957). The only provision of §1292 in any way pertinent is subsection (a)(1) authorizing appeal from "Interlocutory orders * * * granting* * * [or] refusing * * * injunctions." Lummus says Judge Dawson's order did both; we hold it did neither.

(a) The claim that the order refused an injunction rests on the premise that a petition seeking to compel arbitration is in effect a request for a mandatory injunction, cf. *Red Star Laboratories Co.* v. *Pabst*, 100 F. 2d 1, 3-4 (7 Cir. 1938), hence a reference to trial on the issue of arbitrability is said to be the refusal of an injunction. A contrary position was taken in *Division 689* v. *Capital Transit Co.*, 227 F. 2d 19 (D. C. Cir. 1955), and *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, 232 F. 2d 366 (D. C. Cir. 1956). Although Lummus' attempt at distinction on the basis that the District of Columbia Circuit follows the rule of *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160 (3 Cir. 1950), that the denial of a plaintiff's motion for summary judgment in a suit for an injunction is not a refusal of an injunction within §1292(a)(1), rather than the contrary rule of *Federal Glass Co.* v. *Loshin*, 217 F. 2d 936 (2 Cir. 1954), to which we adhered in *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F. 2d 800 (2 Cir. 1960), might dispose of Division 689, it does not have that effect on John Thompson, where Judge Fahy rested

decision also on the ground that "The suit was not for injunctive relief in the traditional sense, nor even for specific performance strictly speaking. It was for a unique statutory remedy." We agree with that reasoning; we cannot believe that when Congress adopted the Federal Arbitration Act to facilitate what was thought to be a speedy method for determining controversies, it considered that orders directing or refusing to direct a trial of arbitrability, under 9 U. S. C. §4, would be appealable under 28 U. S. C. §1292(a)(1) as the denial or grant of a mandatory injunction to arbitrate; and if it did not intend orders granting or denying motions for such a trial under the Federal Act to be thus appealable, it hardly meant that a similar order in any other proceeding to compel arbitration should be.

(b) The second ground urged for appealability is that the order staying arbitration is the grant of an injunction, as an order staying a proceeding in another court would clearly be. *Gray, McFawn & Co.* v. *Hegarty, Conroy & Co.*, 85 F. 2d 516 (2 Cir. 1936); *Tyrill* v. *Alcoa SS. Co.*, 266 F. 2d 27 (2 Cir. 1959).

Commonwealth's first gambit against this is *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955), which held that a district court's refusal to enter a stay of an accounting action in that court, pending arbitration, was not a refusal of an injunction within §1292(a)(1). Lummus answers that the order there sought to be appealed related to a stay of the court's own proceeding, in equity, which was unappealable under *City of Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254 (1949), cf. *Enelow* v. *New York Life Ins.*

Co., 293 U. S. 379 (1935) and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), rather than the stay of an arbitration which is said to be a separate and independent proceeding. To this Commonwealth rejoins with our decisions in *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 269 F. 2d 618 (2 Cir. 1959), and *Greenstein* v. *National Skirt & Sportswear Ass'n, Inc.*, 274 F. 2d 430 (2 Cir. 1960).

Armstrong-Norwalk was an action seeking a declaratory judgment that plaintiff was under no duty to arbitrate and an injunction against arbitration; the order formally under appeal was a stay of the action pending arbitration. Since the stay was in an action that would have been equitable, the case might thus be viewed as not differing from *Baltimore Contractors* or this court's own previous decision in *Wilson Bros.* v. *Textile Workers Union*, 224 F. 2d 176 (2 Cir.), cert. denied, 350 U. S. 834 (1955). However, the appellant in *Armstrong-Norwalk* had moved for a preliminary injunction against arbitration, 269 F. 2d at 619, and the stay would seem to constitute a refusal of that; therefore, although the opinion does not discuss this basis of appealability, the decision implies that a refusal to stay an arbitration is not a refusal of what §1292(a)(1) means by "injunction." In any event *Greenstein* squarely held that a refusal to stay arbitration, in an action brought for that sole purpose, was not the refusal of an interlocutory "injunction" within §1292(a)(1).

Although we cannot deny that the issue implicitly determined in *Armstrong-Norwalk* and explicitly decided in *Greenstein* was not identical with that in *Baltimore Contractors*, these cases correctly applied

the principle there established. The Supreme Court said in *Baltimore Contractors*, 348 U. S. at 181, that the provisions of §1292(a)(1) with respect to injunctions sprang "from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequences." An order staying or refusing to stay an arbitration pending judicial inquiry into arbitrability does not rise to that level; the only prejudice from the former is a possibly needless trial of the preliminary issue and from the latter an arbitration that may be held void when the time comes for confirmation of the award.[4] Unpleasant

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[4] Lummus has argued against this that, under §1458 of the New York Civil Practice Act, enacted in 1937, N. Y. Laws, c. 341, a party who has participated in the selection of the arbitrators or in any of the proceedings before them may not thereafter "put in issue the making of the contract or submission or the failure to comply therewith" if he has "made or been served with an application to compel arbitration" under §1450. However, this New York provision exists in a setting wherein an order directing arbitration or refusing a stay is appealable as a final order, Civil Practice Act, §1467; *Matter of Hosiery Manufacturers Corp.* v. *Goldston*, 238 N. Y. 22, 143 N. E. 779 (1924); *Matter of Paloma Frocks, Inc.* v. *Shamokin Sportswear Corp.*, 2 N. Y. 2d 782, 139 N. E. 2d 425, 158 N. Y. S. 2d 327 (1956); the New York legislature thought one such full opportunity to test out arbitrability was enough. If uniformity in the application of 28 U. S. C. §1292(a)(1) in this area of orders concerning arbitration can be obtained only by holding §1458 of the New York Civil Practice Act inapplicable, under the rules of decision statute, 28 U. S. C. §1652, in an arbitration proceeding in the Federal courts, even though the contract not be within §§1 and 2 of the Federal Act, we think that, despite *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198 (1956), the rules of decision statute should be so construed—such a construction being constitutional on the basis that §1458 is "procedural" or at least lies in the "twilight zone," *Iacono* v. *Waterson*, 274 F. 2d 41, 47-48 (2 Cir. 1959), cert. denied, 362 U. S. 949 (1960). In any event, under *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, *supra*, §1458 would be inapplicable in the Federal courts when, as appears to be the case here, the contract is within the Federal Act.

as such consequences may be, they scarcely seem to have been what Congress had in mind when it established what is now 28 U.S.C. §1292(a)(1) as an exception to the general rule of finality in Federal appellate procedure. This is especially so in view of the baneful effect that permitting appeals from orders refusing stays would have upon the speed which is one of the supposed advantages of arbitration. Yet, if an order refusing a stay of arbitration is not a refusal of an "injunction" within §1292(a)(1), an order granting such a stay cannot well be the grant of an "injunction" within that section. Despite the Supreme Court's disapproval, in *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 202 (1956), of Judge Learned Hand's statement in *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383 (2 Cir. 1944), that "arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law", it remains undeniable that arbitration differs from a proceeding in another court in the essential respect that the arbitration cannot produce an enforceable result without further judicial action. We said in *Grant* v. *United States*, 282 F. 2d 165, 170 (2 Cir. 1960), "that not every request for an order containing words of restraint is one for an injunction within §1292(a)(1)"; here also we reject a broad literal interpretation of "injunction" because of what we conceive to have been the narrower purpose of Congress.

(2) *Mandamus.*

In the light of *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 254 (1957), Commonwealth properly does

not challenge our power to issue a writ of mandamus that would reach the District Judge's order; it does challenge the propriety of our exercising the power. We recognize that, as stated in *La Buy*, p. 260, the power should be used only in "exceptional circumstances," since to do otherwise would frustrate the basic Federal policy against piecemeal appeals. Hence delay of arbitration through direction of a possibly needless trial of arbitrability *in limine* would not normally suffice to warrant the issuance of mandamus. See *In re Union Leader Corp.*, 292 F. 2d 381, 384 (1 Cir. 1961). We need not decide whether the fact that the delay in this case has already lasted for some thirty months would alone constitute an "exceptional circumstance." Here Lummus asserts the District Judge has directed reexamination of an issue that has been conclusively determined in its favor by another Court of Appeals. The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), the right to trial before an unbiased judge, *United States* v. *Ritter*, 273 F. 2d 30, 32 (10 Cir. 1959), cert. denied, 362 U. S. 946, 950 (1960), *In re Union Leader Corp., supra*, or the right to trial directly by a judge rather than initially by a master, *La Buy* v. *Howes Leather Co., supra*. Accordingly we think the case appropriate for mandamus if Lummus' assertion is made out, as we find it to be.

(3) *Jurisdiction of the District Court.*

Before proceeding further we must consider whether Lummus was right in its claim, overruled by Judge

Weinfeld, that the District Court lacked jurisdiction. For, even though no appeal from the order refusing a remand was or could have been taken, "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). The principal ground for remand asserted by Lummus was that the decision of a divided Court in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582 (1949), upholding Federal jurisdiction in an action between a citizen of the District of Columbia and a citizen of a state, is inapplicable to a suit between a citizen of Puerto Rico and a citizen of Delaware. Happily we can limit ourselves to saying that this and other contentions are sufficiently disposed of by Judge Weinfeld's thorough opinion, 195 F. Supp. 47 (S.D.N.Y. 1961), denying Lummus' motion.[5]

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[5] We would go further and adopt Judge Weinfeld's opinion as our own save only that we think we ought reserve complete liberty on various unsettled questions, suggested in Part II of that opinion and in footnotes 4 and 7 of this one, as to the "procedural" and "substantive" law governing proceedings in the Federal courts to compel or prevent arbitration, and the border-line between them. Four situations suggest themselves: (A), Proceeding begun in Federal court—contract not within Federal Act; (B), Proceeding removed to Federal court—contract not within Federal Act; (C), Proceeding begun in Federal court—contract within Federal Act; (D), Proceeding removed to Federal court—contract within Federal Act. Each of these situations may involve some questions that are "substantive" and others that are "procedural." Several of these eight squares have been occupied—subject to the ever present problem of determining the substantive-procedural boundary. *Bernhardt* teaches that state "substantive" law of arbitrability applies in (A); the same would surely be true of (B). *Robert Lawrence* teaches, so far as this Court can, that

Opinion of Court of Appeals for the Second Circuit (Friendly, J.), Dated November 14, 1961

(4) *Conclusiveness of the First Circuit decision with respect to fraud in the inducement.*

The First Circuit decision plainly is not conclusive with respect to Commonwealth's contention concerning the effect of the final sentence of the arbitration clause, relating to insurance, since the Court stated it had "not decided" that issue, 280 F. 2d at 933, fn.; and we reserve for later consideration the effect of its decision on the contention that certain of Lummus' claims fall outside the arbitration clause. We deal now with the conclusiveness of the decision on Commonwealth's plea of non-arbitrability because of fraud in the inducement.

The District Court for Puerto Rico had issued its injunction against the arbitration and the New York proceeding to compel arbitration because the Court had found, in the language of the Puerto Rican statute, "that a substantial dispute has arisen as regards the

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Federal "substantive" law of arbitrability governs in (C), and this should likewise be true of (D). Federal "procedural" law clearly governs (A) and (C). We do not mean this listing of original and removed proceedings as separate categories to indicate any view on our part that different rules should apply; counsel occasionally seem to think so and we leave the matter open. Perhaps, in view of *Robert Lawrence*, we ought add to the list (E). Proceeding remaining in state court—contract within Federal Act, but that will not be our responsibility to decide.

Judge Weinfeld's conclusion that Puerto Rico's status as a "commonwealth," 48 U. S. C. §§731b-731e, also 66 Stat. 327 (1952), has not caused it to cease to be a "territory," is now further buttressed by *United States* v. *De Jesus*, 289 F. 2d 37, 46 (2 Cir. 1961).

validity or existence of the arbitration agreement * * *".[6] The First Circuit decision held that "Commonwealth failed to raise a substantial issue as to the making or existence of the contracts." If arbitrability in the instant proceeding is governed by the New York arbitration act, the question is whether Commonwealth has set forth "evidentiary facts * * * raising a substantial issue as to the making of the contract," N. Y. Civil Practice Act, § 1450; if the Federal act governs, the question is whether the court is "satisfied that the making of the agreement for arbitration * * * is not in issue," 9 U. S. C. § 4. Quite evidently, despite minor language differences, the question under either statute[7] is the same as the question the First Circuit decided and the Supreme Court declined to review. Why, then, should the issue be open to further litigation?

Commonwealth's first answer is that the issue would have remained open in the District Court for Puerto

[6] 32 Laws of Puerto Rico Ann. § 3204(2). Subsection (4) says that "In order to give rise to [such] a dispute * * *, the party concerned shall state the proved facts on which said dispute is founded."

[7] *Bernhardt* v. *Polygraphic Co.*, *supra*, held that "the 'agreement in writing' for arbitration referred to in §3 [of the Federal Act] is the kind of agreement which §§1 and 2 have brought under federal regulation." 350 U. S. at p. 201; and that hence in an action for breach of a contract not within §§1 and 2, in which Federal jurisdiction rested on diverse citizenship, a Federal court should not grant a stay of the action pending arbitration if one would not be granted by the courts of the state where the Federal court sat. Under that decision, we should suppose that the state formulation of the issue would apply here if the contract was not within §§1 and 2 of the Federal Act; conversely that, under *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, *supra*, the federal formulation would apply if it were. However, we here perceive no significant difference between the two.

Rico if the Court of Appeals had not directed that court to stay its proceedings, and therefore must be so here. If the premise were sound, the conclusion would follow. It is not. Commonwealth relies on the Court's statement, in denying its petition for rehearing, 280 F. 2d at 933, "The stay that we indicated is not the equivalent of the stay which would be entered upon a motion for a stay of the action under an arbitration statute. Such a stay would indeed settle all questions of arbitrability." What this means to us is that, in contrast to what would have happened if the Court of Appeals had directed arbitration and stayed all actions in the meanwhile, the First Circuit decision did not foreclose all issues of arbitrability, notably that in regard to insurance; we do not think Judge Aldrich meant that, but for the stay of its own proceedings, the District Court for Puerto Rico would have been free to disregard the Court of Appeals' conclusion, to the formulation of which that Court had "devoted a sizeable portion of the past several months," 280 F. 2d at 932, that "Commonwealth failed to raise a substantial issue as to the making or the existence of the contracts," *id.* at 931, and to give Commonwealth another chance. In denying Commonwealth's petition for rehearing the Court of Appeals rejected new factual material as too late; it is scarcely likely that the Court intended to allow the District Court to accept what it had rejected.

Commonwealth's second answer is that the First Circuit decision was "interlocutory." It seeks to bring itself within the rule that action with respect to a temporary injunction, whether by a trial court or an

appellate court, ordinarily is not "binding on the trial court nor upon either of the parties in considering and determining the merits of the controversy." *Benson Hotel Corp.* v. *Woods*, 168 F. 2d 694, 697 (8 Cir. 1948); *Walker Memorial Baptist Church, Inc.* v. *Saunders*, 285 N. Y. 462, 474, 35 N. E. 42, 47 (1941), and the principle that conclusiveness generally attaches only to "final" judgments, American Law Institute, Restatement of Judgments, §41; 2 Freeman, Judgments (5 ed. 1925), p. 1406. However, to borrow Mr. Justice Brandeis' famous phrase, "final" also is "a word of many meanings," *Southwestern Bell Telephone Co.* v. *Public Service Comm'n*, 262 U. S. 276, 310 (1923); the law of judgments does not use it in relation to conclusiveness, as 28 U. S. C. §1291 does, to mean only a judgment "which ends the litigation * * * and leaves nothing for the court to do but execute the judgment," *Catlin* v. *United States*, 324 U. S. 229, 233 (1945).

In New York the view that certain determinations on motions may be conclusive as to matters actually litigated goes back as far as *Dwight* v. *St. John*, 25 N. Y. 203 (1862) and *Riggs* v. *Pursell*, 74 N. Y. 370 (1878). The Supreme Court of Kansas noted long ago, in a much cited opinion, "a growing disposition to enlarge the scope of the doctrine of *res judicata*, and to place more regard on the substance of the decision than on the form of the proceedings." *Board of County Commissioners* v. *McIntosh*, 30 Kan. 234, 238, 1 Pac. 572, 575 (1883). That disposition has continued to grow, see 2 Freeman, Judgments (5 ed. 1925), §668, citing many cases, of which *Lake* v. *Bonynge*, 161 Cal. 120, 118 Pac. 535 (1911); *Truesdale* v. *Farmers'*

Loan & Trust Co., 67 Minn. 454, 70 N. W. 568 (1897); and *Burner* v. *Hevener*, 34 W. Va. 774, 12 S. E. 861 (1891), are especially pertinent, and, more recently, such cases as *First National Bank & Trust Co.* v. *Kirby*, 62 S. D. 489, 253 N. W. 616 (1934); *Schuman* v. *Sternberg*, 179 Okla. 118, 65 P. 2d 413 (1937); and *Darlington* v. *Basalt Rock Co.*, 10 Cal. Rptr. 556 (D. Ct. App. 1961). New York has held that an order directing arbitration, *Matter of Marchant* v. *Mead-Morrison Manufacturing Co.*, 252 N. Y. 284, 169 N. E. 386 (1929), and an order refusing a stay of arbitration, *Reo Garment Inc.* v. *Jason Corp.*, 6 A. D. 2d 401, 178 N. Y. S. 2d 368 (1st Dept. 1958), aff'd mem. 6 N. Y. 2d 725, 158 N. E. 2d 505, 185 N. Y. S. 2d 812 (1959), are *res judicata*. To be sure, New York deems such orders "final" as that term is used in the appeal provisions of the Civil Practice Act, see footnote 3, but we do not think the *Marchant* or *Reo* decisions would have differed if the orders, though not "final" in that sense, were nevertheless appealable as "non-final" orders, and certainly not if they had been appealed. Whether a judgment, not "final" in the sense of 28 U. S. C. §1291, ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. "Finality" in the context here relevant may mean little more than that the ligitation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

The First Circuit decision satisfies all these determinants. We have already settled that the decision

was not intended to be tentative. The Puerto Rican statute, like those of New York and the United States, affords a party challenging a demand for arbitration an opportunity for a trial as to the existence of an agreement to arbitrate, upon his first satisfying the court that a genuine issue exists. The response to such a challenge from the party seeking arbitration is like a motion for a summary judgment that no showing of such an issue has been made. In the typical case in the Federal courts, a determination by the district court in such a controversy would not be appealable, and conclusiveness might well be denied on that ground until an appealable judgment had been rendered, cf. American Law Institute, Restatement of Judgments, §69(2). Here, however, the order of the District Court of Puerto Rico determining that a sufficient showing had been made was appealable (since it enjoined the New York action), and was appealed. Under such circumstances we see no reason why a decision that the party opposing arbitration has made no showing of a genuine issue as to the existence of an agreement to arbitrate should be less conclusive than are similar determinations under F. R. Civ. Proc. 56. Indeed, for reasons previously indicated, the general policy of preventing relitigation applies with peculiar force to issues preliminary to arbitration. Of course, it is of no moment whether our own analysis as to fraud in the inducement would coincide with the First Circuit's.[8]

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[8] We add for clarity that we do not hold any determination by the First Circuit with respect to fraud, rescission, etc. to be conclusive save on the limited issue of arbitrability.

(5) *The scope of decision on the petition for mandamus.*

The foregoing leads to the conclusion that we must direct a vacating of the order insofar as it permits a trial of the defense to arbitration based on fraud in the inducement. Assuming for present purposes that the conclusiveness of the First Circuit decision is confined to that issue, we must now decide whether we should so limit our decision or should also pass upon the other issues of arbitrability, to the full extent the record will permit, although we might not have considered mandamus if they had stood alone.

We believe we may lawfully pursue either course, but that on the special facts of this case we ought follow the latter. Nearly two and a half years have elapsed since Lummus demanded arbitration. We see no purpose in a trial of the other claims advanced against arbitrability, when all material needed for their disposition is before us, and, in our view, any determination in Commonwealth's favor by the District Court would ultimately have to be reversed as erroneous in law.

(6) *Commonwealth's contention that certain of Lummus' claims do not arise out of or relate to the contracts.*

Although under the previous point we assumed that the First Circuit's decision was not conclusive on the contention here considered, this is not altogether clear. In its principal opinion the Court of Appeals said, 280 F. 2d 931:

"Commonwealth has not contended that Lummus'

> claim does not constitute an arbitrable issue within the broad provisions of the clause here in question. We believe that this question, if there could be one, is therefore foreclosed to it."

And on rehearing the court said, 280 F. 2d 933, fn.:

> "It seems late for Commonwealth to suggest that the general scope of the arbitration clause was not before the court."

If the case had come before the Court of Appeals on an answer by Commonwealth to a petition of Lummus for arbitration, we should suppose the decision would have been conclusive not only on issues of arbitrability that were raised but on others that could have been, as the Court intimated. However, that was not the posture in which the case was presented, and the authorities discussed above suggest that the conclusive effect of the order may therefore be limited to the issues that Commonwealth actually tendered in support of its prayer for an injunction against the New York arbitration and court proceedings.

We find it unnecessary to determine this, since scrutiny of Commonwealth's contentions demonstrates that, even if open, they are without foundation in law. They deal with bills of Lummus for material or services which were furnished generally in connection with the work but which Commonwealth says were not in fact furnished pursuant to the basic contracts. Lummus admits that certain of these claims are based on supplemental agreements, but points out that §22.1 of the contracts contemplated such supplementation. The broad arbitration clause allows arbitration of any

"controversy or claim arising out of or relating to this Agreement"; both federal and New York decisions require a conclusion that the claims in question were sufficiently related to the original contracts that arbitration may proceed. *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 567-569 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Matter of Lipman* v. *Haeuser Shellac Co.*, 289 N. Y. 76, 80, 43 N. E. 2d 817, 819 (1942); *Matter of Excercycle Corp.* v. *Maratta*, 9 N. Y. 2d 329, 337, 174 N. E. 2d 463, 466-467, 214 N. Y. S. 2d 353, 358 (1961); *Matter of Spectrum Fabrics Corp.* v. *Main St. Fashions, Inc.*, 285 App. Div. 710, 139 N. Y. S. 2d 612 (1st Dept.), aff'd mem., 309 N. Y. 709, 128 N. E. 2d 416 (1955); *Matter of Transpacific Transport Corp.* v. *Sirena Shipping Co.*, 9 A. D. 2d 316, 321, 193 N. Y. S. 2d 277, 283 (1st Dept. 1959), aff'd mem., 8 N. Y. 2d 1048, 170 N. E. 2d 391, 207 N. Y. S. 2d 70 (1969).

(7) *The "insurance" exception.*

We come finally to Commonwealth's assertion that a triable issue with respect to arbitration exists because of the last sentence of the arbitration paragraph: "It is agreed, however, that this Agreement shall not apply to claims or damages for which either party has contracts of insurance protecting their respective interests."

Article 12 of the 1954 contract, entitled "Insurance Coverage," requires that "During the performance of the work covered by this Agreement and until the Plant is accepted in accordance with this Agreement

and until all of Contractor's and Subcontractors' personnel and property have left the Job Site." Contractor (Lummus) shall carry various types of insurance. These include Workmen's Compensation Insurance (including Employer's Liability Insurance); Comprehensive General Liability Insurance (bodily injuries and property damage); Automobile Public Liability and Property Damage Insurance (covering "all owned and non-owned vehicles furnished by Contractor"); Excess Liability Insurance covering Employer's Liability, Automobile Liability and General Liability ("This insurance to include the interest of the Purchaser, the Contractor and all Subcontractors, and to apply to occurrences happening anywhere in the world. The policy, terms, conditions and exclusions shall be subject to the approval of the Purchaser."); All Risk Transportation and Installation Insurance ("direct loss or damage to property of Contractor, Purchaser and Subcontractor"); Ocean Marine Cargo Insurance; Broad Form Payroll Insurance; and Broad Form Monies and Securities Insurance. Under §12.10, policies were to be endorsed to require insurers to notify both Purchaser and Contractor of any cancellation; and "All the insurance under this Article 12.0 where permissible by law shall be written to cover the interest of Purchaser and Contractor as these may appear."

Article 12 of the 1956 contract differes but slightly. The provision as to Excess Liability Insurance was omitted, and a new section was added that: "Purchaser shall provide in all insurance carried by it for damages to or loss of use of its property that such

insurance is without right of subrogation against Contractor or its subsidiaries." On September 18, 1956, two modifications in Article 12 of the 1956 contract were made. An Excess Liability Insurance provision was added, similar to the 1954 provision, except that the interests to be included were only those "of the Contractor and all Subcontractors"; the provision in Article 12.10, "All insurance under this Article 12.0, where permissible by law, shall be written to cover the interest of Purchaser and Contractor as they may appear," was eliminated.

Lummus asserts and Commonwealth does not deny that the final sentence of the arbitration paragraph stemmed from the following circumstance: On January 12, 1953, the Appellate Division for the Second Department decided *Madawick Contracting Co., Inc.*, v. *Travelers Ins. Co.*, 281 App. Div. 754, 118 N. Y. S. 2d 115 (1953). The case concerned an insurer which had agreed to pay all sums the insured subcontractor "shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property" and to defend "any suit against the insured alleging such injury or destruction and seeking damages on account thereof." The decision was that "the policy did not require appellant [insurer] to defend plaintiff [insured] in an arbitration proceeding nor obligate it to pay any award entered against plaintiff in such a proceeding."

Marsh & McLennan, Incorporated, who were insurance brokers for both Lummus and Commonwealth, circularized their clients as to the *Madawick* decision. Their memorandum began by noting that although

"Arbitration contracts have appeared in construction contracts for many years," only "Rarely, has the arbitration clause been brought into issues involving bodily injury or property damage claims covered by Contractors Liability Insurance." After summarizing the decision, the memorandum stated "that, if your Company includes in contracts with others arbitration clauses which are broad enough to apply to claims for damages that would normally fall under Public Liability insurance, following the above decision, there probably is no coverage under such insurance for arbitration proceedings," and recommended that, for the time being, "it would seem wise if you must accept arbitration clauses, to have them exclude situations which would normally fall under insurance." The final sentence of the arbitration paragraph, drafted in the light of this suggestion, was included in the contract of July 8, 1954, and also in the contract of March 14, 1956, although the New York Court of Appeals had reversed *Madawick* on May 27, 1954, 307 N. Y. 111, 120 N. E. 2d 520.[9]

Commonwealth contends the final sentence excludes or limits arbitration because of two circumstances: It says that although Lummus has averred that Lummus "has no contracts of insurance which provide any coverage with respect to the amounts due Lummus from Commonwealth under their contract and which are the subject of Lummus' claim," Lummus has not denied the carriage of insurance against

[9] Since some law other than New York's might govern the liability of an insurer to the parties, the reversal of the Appellate Division's decision did not necessarily destroy the basis that had underlain insertion of the final sentence.

claims for misfeasance such as Commonwealth is making. Moreover, Commonwealth asserts it has insurance against some of the losses it seeks to recover against Lummus; although it does not amplify this, the suggestion seems to be that this may come within the policy of the final sentence, at least as to the 1954 contract, since submitting Commonwealth's claims to arbitration might be offensive to the insurer as subrogee.

If Lummus had limited its notice of arbitration to the outstanding bills of $4,697,797.85, Commonwealth's claim would be plainly untenable since Lummus swears it has no insurance protecting it against loss of these amounts and Commonwealth does not suggest the contrary; the controversy as to the effect of the final sentence thus relates solely to Lummus' inclusion of a demand for "a determination of any setoffs or counterclaims against the undersigned which Commonwealth may assert." Even as to this, we consider Commonwealth's contention unfounded as a matter of law. The final sentence of the arbitration paragraph was surely not intended to render nugatory all that preceded; yet, on Commonwealth's interpretation, either party, by obtaining insurance to protect its interests, could at any time block the other's road to arbitration. Lord Bacon's Maxim, reg. 10, "All words, whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person," which Judge Van Voorhis quoted in *Madwick*, is equally pertinent here. See also *Mantell v. International Plastic Harmonica Corp.*, 141 N. J.

Eq. 379 55 A. 2d 250 (1947); *Sternbergh* v. *Fehling*, 396 Pa. 280, 152 A. 2d 473 (1959); and other cases cited in 3 Corbin, Contracts, §549. In order to afford a sensible interpretation of the paragraph as a whole, the final sentence must be confined to what we know to have been its purpose, "claims for damages that would normally fall under Public Liability insurance" called for by Article 12.

Commonwealth asserts that such a reading would deprive the final sentence of effect, since both it and Lummus were to be named in the Article 12 insurance under the 1954 contract, and also under the 1956 contract until its amendment, and neither would have reason to demand arbitration of a claim the insurer was bound to pay. Apart from the fact that Commonwealth was to be included as an insured only "where permissible by law," the argument ignores that the insurance was insurance against liability. Thus, inclusion of Commonwealth in Lummus' property damage insurance meant that Commonwealth as well as Lummus was protected against liability as to claims for damage to the property of others, not that the insurer was bound to pay Commonwealth for damage to Commonwealth's own property caused by Lummus; as to this the insurer was bound to pay Lummus if the latter was found liable to Commonwealth, and the final sentence enabled Lummus to insist that any such liability be determined otherwise than by arbitration and thus avoid the problem that had confronted the Madawick Company until the New York Court of Appeals set matters right. And even as to third party claims circumstances might exist, including the

obvious although possibly remote one of a claim exceeding the insurance coverage, where one party might find it necessary or desirable to proceed against the other. It may be that the office our construction leaves the final sentence is a small one; we prefer that to a reading that would allow an exception, ineptly worded to meet a particular problem, to swallow the rule. We hold that "contracts of insurance" as used in the final sentence of paragraph 25.1 means contracts of insurance procured pursuant to paragraph 12. Commonwealth does not assert that any of the claims sought to be arbitrated are so covered.

Commonwealth thus having failed to raised any issue of arbitrability warranting a trial, the District Court's order directing one and staying arbitration pending its determination should be vacated. The order being interlocutory and thus still under the control of the District Judge, we assume no further action on our part is required. Since Commonwealth is the prevailing party on the appeal but nominally is not a party to the petition for mandamus, we think it best that costs in the instant proceedings abide the ultimate outcome.

Appeal dismissed for lack of appellate jurisdiction; petition for mandamus granted.

Judgment (Appealability) of Court of Appeals for the Second Circuit, Entered November 14, 1961

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of November one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH, *Circuit Judges*.

THE LUMMUS COMPANY,
Petitioner-Appellant,

v.

COMMONWEALTH OIL REFINING COMPANY, INC.,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York

Judgment (Appealability) of Court of Appeals for the Second Circuit, Entered November 14, 1961

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the order of said District Court be and it hereby is dismissed for lack of appellate jurdisdiction.

A. DANIEL FUSARO
Clerk

Judgment (Mandamus) of Court of Appeals for the Second Circuit, Entered November 14, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of November, one thousand nine hundred and sixty-one.

Present: HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH, *Circuit Judges*.

THE LUMMUS COMPANY,

Petitioner,

v.

HONORABLE ARCHIE O. DAWSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

A petition for a writ of mandamus having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is granted in accordance with the opinion of this Court.

A. DANIEL FUSARO
Clerk

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 625

IN THE

Supreme Court of the United States

OCTOBER TERM 1961.

THE HONORABLE ARCHIE O. DAWSON, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

against

THE LUMMUS COMPANY,

Respondent.

BRIEF IN OPPOSITION.

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January 22, 1962

INDEX.

	PAGE
OPINIONS BELOW	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	3
ARGUMENT:	
I.—There is no reason for this Court to review the Court of Appeals' exercise of its discretion in granting the writ of mandamus	13
II.—The Court of Appeals for the Second Circuit correctly held the prior determination of the Court of Appeals for the First Circuit to be conclusive with respect to Commonwealth's claim of rescission for fraudulent inducement	18
III.—The Court of Appeals properly considered and determined the issues of arbitrability which it regarded as not conclusively determined by the First Circuit	25
IV.—Commonwealth's constitutional rights have not been in any way infringed	27
CONCLUSION	29

Table of Cases.

	PAGE
Baldwin v. *Iowa State Traveling Men's Assoc.*, 283 U. S. 522 (1931)	23
Banke v. *Novadel-Agene Corporation*, 130 F. 2d 99 (6th Cir. 1942), *cert. denied*, 317 U. S. 692 (1942)	20
Bee Mach. Co., Inc. v. *Freeman*, 131 F. 2d 190 (1st Cir. 1942), *aff'd*, 319 U. S. 448 (1943)	24
Byram Concretanks, Inc. v. *Meaney*, 286 F. 2d 170 (3d Cir. 1961)	17
Carson Investment Co. v. *Anaconda Copper Mining Co.*, 26 F. 2d 651 (9th Cir. 1928)	24
Chas. Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522 (1923)	28
Chesapeake & Ohio Railway v. *McCabe*, 213 U. S. 207 (1909)	21
Deckert v. *Independence Shares Corp.*, 311 U. S. 282 (1940)	26
Dorchy v. *Kansas*, 264 U. S. 286 (1924)	28
Duignan v. *United States*, 274 U. S. 195 (1927)	27
Ex parte Harding, 219 U. S. 363 (1911)	17
Ex parte Hoard, 105 U. S. 578 (1881)	17
Ex parte Roe, 234 U. S. 70 (1914)	17
Gulf Research & Development Co. v. *Leahy*, 193 F. 2d 302 (3d Cir. 1951), *affirmed by an equally divided Court on other issues*, 344 U. S. 861 (1952)	16
Hoffman v. *Blaski*, 363 U. S. 335 (1960)	20, 21
Hotel Corp. of Cleveland v. *United States District Court*, 283 F. 2d 470 (6th Cir. 1960)	17
In Re Union Leader Corp., 292 F. 2d 381 (1st Cir. 1961), *cert. denied*, 30 U. S. Law Week 3180 (Dec. 4, 1961)	16
J. R. Clark Co. v. *Jones & Laughlin Steel Corp.*, 288 F. 2d 279 (7th Cir. 1961), *cert. denied*, 368 U. S. 828 (1961)	24
Kloeb v. *Armour & Co.*, 311 U. S. 199 (1940)	20, 21

PAGE

Labuy v. *Howes Leather Co.*, 352 U. S. 249 (1957)..... 13, 17
Larkin Automotive Parts Co. v. *Bassick Manufacturing Co.*, 19 F. 2d 944 (7th Cir. 1927)..... 24
Lawn v. *United States*, 355 U. S. 339 (1958)..... 27
Martucci v. *Mayer*, 210 F. 2d 259 (3d Cir. 1954)..... 20
Matter of Marchant v. *Mead-Morrison Manufacturing Co.*, 252 N. Y. 284, 169 N. E. 386 (1929)..... 20
North Carolina Railroad Co. v. *Storey*, 268 U. S. 288 (1925) 26
Reo Garment Inc. v. *Jason Corp.*, 6 App. Div. 2d 401, 178 N. Y. S. 2d 368 (1st Dep't 1958), *aff'd*, 6 N. Y. 2d 725, 158 N. E. 2d 505, 185 N. Y. S. 2d 812 (1959) 20
Roche v. *Evaporated Milk Association*, 319 U. S. 21 (1943) 13
Sewerage Commission of City of Milwaukee v. *Activated Sludge*, 81 F. 2d 22 (7th Cir. 1936)..... 24
Smith v. *Vulcan Iron Works*, 165 U. S. 518 (1897)..... 26
Stokke v. *Southern Pacific Co.*, 169 F. 2d 42 (10th Cir. 1948) 20
TCF Film Corp. v. *Gourley*, 240 F. 2d 711 (3d Cir. 1957) 16
Ullmann v. *United States*, 350 U.S. 422 (1956)..... 27
United States v. *Rice*, 327 U. S. 742 (1946)..... 17

STATUTES.

New York Civil Practice Act §1458(2)..... 7, 19
28 U. S. C. §1404(a)..... 21
32 Laws of Puerto Rico Annotated §3204(4)(a).....5, 7, 19

OTHER AUTHORITIES.

Note, 50 *Yale Law Journal* 158 (1940)..... 21
Note, 98 *University of Pennsylvania Law Review* 80 (1949) 21

IN THE

Supreme Court of the United States

OCTOBER TERM 1961.

THE HONORABLE ARCHIE O. DAWSON, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Petitioner,

against

THE LUMMUS COMPANY,
Respondent.

BRIEF IN OPPOSITION.

Opinions Below.

The opinion of the Court of Appeals is not yet officially reported, but it is printed at pages 86-114 of petitioner's Supplemental Appendix (hereinafter referred to as "S. A."). The judgments of the Court of Appeals are printed at pages 115-17 of the Supplemental Appendix.* The order of the District Court which was reviewed by the Court of Appeals is printed at pages 83-85 of the Supplemental Appendix. The District Court's opinion is printed at pages 73-82 of the Supplemental Appendix.

Questions Presented.

Since petitioner's statement of the questions presented does not accurately represent the issues before this Court,

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* Subsequent to the filing of the opinion of the Court of Appeals for the Second Circuit Commonwealth applied in that court, and then in this Court, for a stay of the mandate of the Court of Appeals pending disposition of this petition. Both applications were denied, the mandate issued, and an order on mandate has been entered by the District Court.

a counterstatement of the questions presented is necessary. The questions presented to this Court are as follows:

1. Whether the Court of Appeals for the Second Circuit properly exercised its discretion in issuing a writ of mandamus to prevent the District Court from ordering a trial of certain issues of arbitrability, and staying arbitration pending such trial, where the principal issue ordered to trial had already been finally determined by another Court of Appeals in this same case, with certiorari denied, and where the arbitration had already been delayed for more than 30 months by judicial proceedings in connection with the issues of arbitrability raised by Commonwealth.

2. Whether the Court of Appeals for the Second Circuit properly held that the final determination of the Court of Appeals for the First Circuit that Commonwealth's claim of rescission for fraudulent inducement failed to raise a substantial issue, and this Court's denial of a Petition for Certiorari seeking review of that decision, precluded relitigation of that identical issue in the United States District Court for the Southern District of New York.

3. Whether the Court of Appeals correctly held that, once the District Court's order was before it for review, it might determine that none of the challenges to arbitrability made by Commonwealth was substantial or had any foundation in law, and direct the District Court to vacate the order which had required a trial of those issues.*

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* Petitioner also states a constitutional issue which it alleges to be raised by its Petition. As is pointed out hereafter, no constitutional issue is properly raised or presented to this Court.

Statement of the Case.

Commonwealth's Petition for Certiorari is the second which it has filed in this litigation in its attempt to evade arbitration. The present petition is no more meritorious than the one which this Court denied on December 5, 1960.

Since the present Petition for Certiorari fails to provide an accurate description of the rulings of the Court of Appeals for the Second Circuit and fails to place those rulings properly in context, a counterstatement of the case is required.

The Lummus Company performs professional engineering services in the design and construction of chemical plants of various kinds including particularly oil refineries and related equipment. Lummus has designed such plants all over the world (R. 122). By its two contracts with Commonwealth, executed on July 8, 1954 and March 14, 1956, respectively, Lummus agreed to design and construct for Commonwealth an oil refinery and an expansion refinery in Puerto Rico.

While Commonwealth likes to refer to "alleged" contracts between the parties and likes to refer to the contracts in quotation marks (Petition, p. 4), it is perfectly clear that two contracts, carefully drawn and carefully reviewed by both parties, were executed and that those contracts constitute the framework for the present litigation.

Each of these contracts contains an arbitration clause reading, in part, as follows:

> "Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association" (R. 42, 89).

Among the other significant provisions of each contract is the following:

> "All previous figures, proposals and agreements submitted by Contractor or Purchaser, either orally or written, pertaining to the work covered by this Agreement are cancelled" (R. 43, 90).

The contracts also defined in great detail the guarantees made by Lummus with respect to the performance of the refinery (R. 44-59, 91-101). The effect of these guarantees was that Lummus obligated itself to construct facilities which would, during a designated acceptance-test period and under defined conditions, produce from a particular carefully defined crude oil a specified yield of products. The contracts provided that if, on the conducting of acceptance tests, the plant failed to meet the guarantees Lummus would make such changes in the plant as were necessary to meet them (R. 29-30, 86). The contracts then stated:

> "Contractor's liability in respect to performance guarantees of the Plant is expressly limited to the extent stated in this section" (R. 30, 86).

Finally, the contracts provided that, if Lummus notified Commonwealth that it was ready to conduct acceptance tests and if Commonwealth failed to conduct the tests within 45 days and failed to pay the amount due to Lummus within that time, "all obligations of the Contractor with respect to initial operations or acceptance tests or performance guarantees shall terminate and it shall be deemed that the Purchaser has automatically accepted the plant" (R. 19-20, 81-82).

Pursuant to these contracts Lummus proceeded to design and construct the contemplated plants. As each of the plants was completed, Lummus discussed with Com-

monwealth the conducting of acceptance tests and requested Commonwealth to conduct such tests. Commonwealth resisted every effort by Lummus to conduct these acceptance tests which constituted the agreed-upon method of determining whether Lummus' obligations had been satisfied (R. 126-30). Commonwealth also withheld payment of sums due and payable to Lummus which eventually totalled $4,697,997.85 (R. 130).

Finally, on November 11, 1958, Lummus formally demanded that acceptance tests be conducted within 45 days in accordance with each contract. Commonwealth refused to conduct the tests (R. 129-30).

Since Commonwealth had frustrated the testing procedure which was designed to resolve any disputes between the parties as to the performance of the refinery and since Commonwealth persisted in its refusal to pay to Lummus the amounts due it for services rendered and materials supplied, Lummus resorted to the arbitration which the parties had provided for in their contracts. On April 29, 1959 Lummus served on Commonwealth a demand for arbitration wherein it sought arbitration of its claims against Commonwealth in the amount of $4,697,997.85 and of "any set-offs or counterclaims . . . which Commonwealth may assert" (R. 131, 109-10).

Upon receiving Lummus' demand for arbitration Commonwealth commenced, on May 4, 1959, an action against Lummus in the United States District Court for the District of Puerto Rico and at the same time moved in that court, pursuant to 32 Laws of Puerto Rico Annotated § 3204 (4)(a), for a stay of the arbitration which Lummus had demanded. Both the action and the motion were based entirely upon very general allegations by Commonwealth that certain studies and projections prepared by Lummus prior to the execution of the contracts were

either fraudulently misleading or constituted negligent misrepresentations (R. 111-20). Commonwealth requested rescission of the contracts and alleged that it had suffered damages in the amount of $60,000,000 and "other sums as yet undetermined" (R. 115).

Prior to the filing of the complaint and motion on May 4, 1959, Commonwealth had never suggested in any way that Lummus had been guilty of fraud, nor had it ever sought to rescind the contracts (R. 132). Indeed, it had repeatedly relied upon the contracts and evidenced its intention to affirm them (R. 138-43).*

On May 20, 1959 Lummus petitioned the Supreme Court of the State of New York for New York County for an order compelling the arbitration which it had demanded (R. 4). This proceeding was thereafter removed by Commonwealth to the United States District Court for the Southern District of New York (R. 1).

Under the Puerto Rican arbitration statute, as well as under the New York statute, the procedure on a motion to

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* In a lengthy footnote Commonwealth makes a number of statements about the factual background of this litigation which find no support whatever in the record (Petition, pp. 5-6, note). Since none of this material is relevant here, no extended response will be attempted. As an example, however, it may be noted that the record does not show that the refineries were "incapable of fulfilling" any representations made by Lummus. Commonwealth's frustration of all of Lummus' efforts to conduct acceptance tests prevented any determination of what the refineries were "capable of producing" (R. 126-30). It is Lummus' view that the failure of the plant to reach anticipated levels of profitability during its first few years of operation was due in part to deficiencies in Commonwealth's operation of the plant and in part to electrical and other difficulties originating outside the plant (e.g., R. 341). The flimsiness of the evidence advanced by Commonwealth in its effort to show that Lummus failed to meet proper standards of professional engineering was commented upon by the Court of Appeals for the First Circuit in its opinion in this case (S. A., p. 47). Oddly, Commonwealth seems to feel that its claim is somehow enhanced by the fact that it has been "publicly and repeatedly" asserted (Petition, p. 6, note).

stay arbitration is that the party moving for the stay must present evidence sufficient to show that a substantial issue exists with respect to the making or existence of the arbitration agreements. 32 Laws of Puerto Rico Annotated §3204(4)(a); New York Civil Practice Act §1458(2). If a substantial issue is shown to exist a trial must be held. If no substantial issue is shown, the motion must fail.

Commonwealth presented in the District Court in Puerto Rico extensive documentary evidence and affidavits in an effort to raise such an issue; Lummus presented affidavits and documentary evidence in opposition to Commonwealth's motion. On the basis of the voluminous record thus built up, the District Court in Puerto Rico concluded that a substantial issue had been raised. It therefore directed a trial of that issue and stayed the arbitration and the proceeding commenced by Lummus in New York pending that trial.

Lummus appealed from this order. In a comprehensive opinion by Judge Aldrich the Court of Appeals for the First Circuit held unanimously that the decision of the District Court must be reversed and that its order must be vacated (S. A., pp. 33-67). In reaching that conclusion the Court of Appeals carefully weighed the evidence submitted by both parties and held that:

> "... Commonwealth failed to raise a substantial issue as to the making or the existence of the contracts ..." (S. A., p. 65).

Briefly stated, the grounds for the ruling of the Court of Appeals were that in order to avoid the arbitration agreements, Commonwealth must show a presently existing right to rescind the contracts in which they were embodied, that Commonwealth had failed to show such a right since it had not properly sought a rescission of the contracts and had not tendered back the consideration received, and that, in any event, Commonwealth had forfeited any right to

rescind by its inordinate delay in asserting such a right and by its affirmance of the contracts long after all relevant information had come into its possession.*

Commonwealth petitioned the Court of Appeals for a rehearing, tendering affidavits which purported to show that the basis for its claim of fraudulent inducement had only recently come into its possession. The Court of Appeals denied the petition for rehearing and refused to receive the tendered evidence. The affidavits submitted by Commonwealth revealed that the information contained in them was in Commonwealth's possession long before the record in the District Court was made (R. 534), and the Court of Appeals pointed out that Commonwealth had failed to make any adequate explanation why this information had not been submitted earlier (S. A., p. 70). The Court of Appeals had pointed out in its original opinion that Commonwealth had had an "opportunity to make a full presentation" (S. A., p. 63).

Commonwealth thereafter filed in this Court a Petition for Certiorari seeking a review of the decision of the Court of Appeals. In its petition Commonwealth emphasized and repeatedly stated to this Court that the decision of the Court of Appeals had finally rejected its claim of fraudulent inducement and precluded relitigation of that issue. Thus Commonwealth said in its petition:

> "The effect is to grant summary judgment against petitioner . . . and to preclude any reexamination of these issues of merit" (Petition for Certiorari, October Term 1960, No. 455, p. 23).

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* Commonwealth lays emphasis on certain findings in which it suggests that three judges concurred, Judge Magruder, Judge Ruiz Nazario, and Judge Dawson (Petition, p. 5). It should be noted that both Judge Magruder's rulings and Judge Ruiz Nazario's rulings were vacated by a judgment of the Court of Appeals for the First Circuit which this Court declined to review (S. A., pp. 66-67).

In objecting to the refusal of the Court of Appeals to accept the affidavits proffered in support of its petition for rehearing, Commonwealth also said to this Court that it was "forever precluded" from making this proof (Petition for Certiorari, October Term 1960, No. 455, p. 22).

Commonwealth's Petition for Certiorari was denied by this Court on December 5, 1960.

After the District Court in Puerto Rico had entered an order on mandate, on January 3, 1961 (R. 525), giving effect to the decision of the Court of Appeals, Lummus immediately wrote to the American Arbitration Association requesting it to continue with the administration of the arbitration (R. 618). It was Lummus' view that Commonwealth's objections to arbitration had been finally resolved and that no further impediment to the continuance of the arbitration existed. In taking this position Lummus relied on the decision of the Court of Appeals for the First Circuit and on Commonwealth's stated views as to the effect of that decision. In Lummus' opinion a decision on the petition to compel arbitration which it had filed in New York was not a necessary antecedent to the arbitration, since Commonwealth's objections to the arbitration had already been disposed of.

Commonwealth countered by filing an answer to Lummus' petition to compel arbitration (R. 435) and by moving in the Southern District of New York for a stay of the arbitration pending a trial of the issues of arbitrability which it alleged had been raised (R. 446).

In its answer and by its motion Commonwealth tendered, first of all, the very same argument which had been tendered to, and rejected by, the Court of Appeals for the First Circuit. That is, it argued that the contracts containing the arbitration agreement had been fraudulently

induced and could be rescinded. The evidence which it tendered in support of this claim was the very same evidence which had made up the record in the District Court in Puerto Rico, together with the affidavits submitted to, and rejected by, the Court of Appeals for the First Circuit.

In its answer and motion for a stay, Commonwealth also presented two additional objections to arbitrability which had not previously been seriously urged. It argued first that a particular clause of the arbitration agreement relating to claims covered by certain insurance barred arbitration of the claims here involved. It also argued that some elements of Lummus' claim were for particular items which fell outside the scope of the arbitration clauses.

Judge Dawson held that Commonwealth had raised substantial issues and that these issues should be ordered to trial (S.A., p. 73). He therefore entered an order directing a trial of all of the issues raised by Commonwealth and stayed the arbitration pending such trial (S.A., p. 83). Judge Dawson did not discuss in his opinion the contentions of the parties nor did he explain why an issue already determined in litigation going all the way to this Court should be relitigated.

Lummus filed a notice of appeal with respect to Judge Dawson's order and, recognizing that the appealability of the order might be called in question, also filed a petition for a writ of mandamus.

The case was originally ordered by Judge Dawson to be placed on the Ready Day Calendar for October 16, 1961, but subsequently, by a consent order signed by Judge Dawson (R. 751), the trial was adjourned until 90 days after determination of the appeal and petition for mandamus. The parties also joined in a motion in the Court of Appeals for a consolidated hearing on the appeal and the

petition and for the advancement of the case on the calendar of the Court of Appeals. This motion was granted and the case was set down for argument on September 25, 196[illegible].

In a comprehensive opinion by Judge Friendly (S. A., pp. 86-114), the Court of Appeals unanimously held that the appeal should be dismissed for lack of appellate jurisdiction, but that the petition for writ of mandamus should be granted.

With respect to the propriety of mandamus, the Court held that, in the context of these arbitration proceedings, and in a situation where arbitration had already been delayed for more than 30 months, the writ might properly issue to compel the District Court to set aside an order directing a trial of an issue already finally and conclusively determined by another Court of Appeals. The Court held that the combination of considerations present here constituted the exceptional circumstances which justify use of this extraordinary remedy (S. A., pp. 97-98).

The Court next held that since it was plain that the Court of Appeals for the First Circuit had already finally determined the identical issue raised here by Commonwealth in its claim of fraudulent inducement, that decision should be given effect and a trial of this issue should not take place (S. A., pp. 100-05).

Finally, the Court turned to the other issues of arbitrability, which it regarded as not finally determined by the Court of Appeals for the First Circuit. With respect to these issues, the Court took the view that it had some discretion in determining whether it would, on the petition for mandamus, consider them or not. Since it found those issues insubstantial and without foundation in law, the Court concluded that it might properly resolve them. In reaching this conclusion the Court noted that nearly two

and a half years had already elapsed since Lummus demanded arbitration and that there could be no purpose in permitting a trial with respect to these issues when all of the material needed for their disposition was before the Court of Appeals and when any determination by the District Court in Commonwealth's favor would ultimately have to be reversed as erroneous in law (S. A., p. 106).

Commonwealth's Petition for Certiorari seeks to challenge these rulings of the Court of Appeals.

ARGUMENT.

The Court of Appeals properly held that the writ of mandamus was an appropriate remedy for dealing with the extraordinary situation presented by this case. The policy favoring expedition in judicial proceedings antecedent to arbitration, the long delay which had already occurred in connection with this arbitration, and the District Court's complete disregard of previous rulings made by another Court of Appeals in this same case, combined to make the issuance of the writ appropriate.

Since the Court of Appeals for the First Circuit had ruled on the very same issue tendered by Commonwealth in the Southern District of New York and had conclusively and finally determined that issue, the Court of Appeals for the Second Circuit correctly held that any further litigation of the issue was precluded.

The Court of Appeals for the Second Circuit also correctly held that, with the case already before it for review, it might properly consider the additional issues raised by Commonwealth and, upon concluding that those issues were insubstantial and without legal foundation, vacate Judge Dawson's order directing their trial.

Finally, Commonwealth's alleged constitutional issue was not raised below and is, in any event, entirely frivolous.

None of the issues raised by Commonwealth's petition is of such a nature as to warrant this Court's granting the writ and reviewing the decision of the Court of Appeals.

I.

There is no reason for this Court to review the Court of Appeals' exercise of its discretion in granting the writ of mandamus.

In its prior decisions this Court has carefully considered the practice which should be pursued by the federal courts of appeals with respect to the issuance of writs of mandamus and defined, insofar as definition is possible, the considerations which should govern that practice. In these prior decisions this Court has emphasized that the only real question involved in the issuance of such a writ by a court of appeals is the question whether the court properly exercised its discretion in the particular circumstances before it. E.g., *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, (1957); *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26 (1943).

The nature of the remedy of mandamus makes a precise definition of the circumstances in which it may properly be used impossible. As this Court said in *Roche* v. *Evaporated Milk Association*, *supra*, relied on by petitioner (Petition for Certiorari, p. 19), the question presented on review of an order granting a writ of mandamus is whether "in the light of all the circumstances" the case was an appropriate one for exercising that power:

> "In determining what is appropriate we look to those principles which should guide judicial discre-

> tion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action" (319 U. S. at 26).

Recognizing that the circumstances in which mandamus is appropriate could only be precisely defined by this Court if it reviewed itself every such petition submitted to a court of appeals, this Court has limited itself to establishing general guide lines to assist the courts of appeals in exercising their function. It is submitted that the guide lines heretofore established are entirely sufficient, that the courts of appeals have had no significant difficulty in following them, and that they have been accurately applied here.

Among the many circumstances which formed the basis of the judgment of the Court of Appeals that mandamus should issue in this case were the following:

1. The proceeding before the court was a proceeding to compel arbitration; it is the intent and purpose of arbitration statutes, both state and federal, that such proceedings should provide a means for expeditious enforcement of arbitration agreements. It is the intention of these statutes that the judicial proceedings antecedent to arbitration should be a brief prelude, not a lengthy litigation.

2. The arbitration in this case was initially demanded by Lummus on April 29, 1959. The judicial proceedings by which Commonwealth has sought to challenge the arbitration had already consumed more than thirty months at the time when the Court of Appeals rendered its decision.

3. The principal issue which the District Court had ordered to trial was an issue already finally determined

by another federal court of appeals, with certiorari denied by this Court.

4. Both parties had joined in recognizing the extraordinary character of the issues presented by the petition for mandamus and the need for their early resolution; the parties had mutually consented to a stay of the trial pending review in the Court of Appeals and they joined in a motion requesting the Court of Appeals to place the matter at the head of its calendar. In their joint motion in the Court of Appeals the parties concurred in the statement that the trial which Judge Dawson had ordered "is likely to be lengthy, complex, and expensive to the parties. . . ." In their joint motion the parties also concurred in the statement that ". . . a determination of the appeal or the petition for mandamus in favor of Lummus may either obviate a trial in the Court below, limit the issues to be tried, or result in a trial of the issues before arbitrators."

The Court of Appeals did not hold, as Commonwealth seems to suggest (Petition for Certiorari, p. 19), that mandamus is appropriate whenever it would avoid a possibly needless trial. Indeed, the Court of Appeals expressly rejected any such ruling (S. A., p. 98).

Rather than adopting any such pervasive principle, the court merely held that the peculiar combination of circumstances here, particularly the 30-month delay in arbitration that had already occurred and the District Court's disregard of a conclusive determination by another Court of Appeals, made the extraordinary remedy appropriate.

The Court of Appeals properly drew analogies from other cases in which mandamus had been used to protect the right to jury trial, the right to trial before an unbiased judge and the right to trial by a judge rather than by a master (S. A., p. 98). It has been recognized that the extra-

ordinary writ may be issued where necessary "in the interest of justice", and particularly where it is necessary to protect the "public confidence in the courts. . . ." E.g., *In Re Union Leader Corp.*, 292 F. 2d 381, 383-84 (1st Cir. 1961), *cert. denied*, 30 U. S. Law Week 3180 (Dec. 4, 1961), and cases there cited. Certainly both the interest in justice and the public confidence in the courts are impaired by repeated relitigation of issues already finally determined on appeal, particularly in a context where there is a great interest in expedition.

The cases relied upon by Commonwealth fail to establish either that the instant decision is in conflict with the rulings of other federal courts or that the courts of appeals have experienced any significant difficulty in applying the principles enunciated by this Court with respect to the proper usage of the writ of mandamus.

The cases principally relied upon by Commonwealth in seeking to suggest the existence of a conflict are *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (3d Cir. 1951), *affirmed by an equally divided Court on other issues*, 344 U. S. 861 (1952), and *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (3d Cir. 1957). In the latter case the court did not even rule on the question of the propriety of mandamus in the circumstances there before it; rather it specifically reserved decision on that question (240 F. 2d at 714, Note 5). In any event, the circumstances before the court in that case were not comparable to those presented here. There the court was not considering the failure of a District Court to give effect to a decision of a Court of Appeals for another Circuit, but rather was considering the rule of comity applicable as between decisions by different judges of the same court. No unusual circumstances were involved.

Nor is the decision in the *Gulf Research* case in any way comparable to this one. There the order of which

review was sought properly gave conclusive effect to a prior ruling of another court and there were no extraordinary factors present which would have made mandamus an appropriate remedy.

The other court of appeals' decisions relied upon by Commonwealth merely represent situations, in no way comparable to the situation here, in which particular courts have held mandamus to be inappropriate in particular circumstances. The principles applied in those cases are not in conflict with the principles applied by the Court of Appeals here.

For example, in *Byram Concretanks, Inc.* v. *Meaney*, 286 F. 2d 170 (3d Cir. 1961), review was sought of an order with respect to the scope of interrogatories. In *Hotel Corp. of Cleveland* v. *United States District Court*, 283 F. 2d 470 (6th Cir. 1960), the order of which review was sought related merely to the amendment of a complaint. Such orders were obviously not the proper subject of a petition for mandamus and the Second Circuit would undoubtedly concur in these and similar rulings.

Nor do the decisions of this Court cited by Commonwealth suggest that the Court of Appeals has here deviated from the principles laid down by this Court. The decisions cited by petitioner at page 19 of its petition were carefully considered by this Court in the *LaBuy* case and any further discussion of them here is superfluous. None of those decisions involved circumstances even remotely comparable to those presented here.*

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* It should be noted that some of the decisions relied upon by petitioner were based upon the particular statutes governing appellate review of orders remanding, or refusing to remand, cases to the state courts. In this category are *Ex parte Roe*, 234 U. S. 70 (1914); *Ex parte Harding*, 219 U. S. 363 (1911); and *Ex parte Hoard*, 105 U. S. 578 (1881). See *United States* v. *Rice*, 327 U. S. 742, 750 (1946). It is obvious that no implications can be drawn from these cases with respect to the propriety of mandamus in connection with orders not relating to remand.

This Court has heretofore articulated, insofar as they can be articulated, the principles which should govern the issuance by the courts of appeals of writs of mandamus. There is no evidence that the courts of appeals have experienced significant difficulty in applying those principles. The Court of Appeals has in the instant case adhered precisely to the rules laid down by this Court. Under these circumstances, petitioner has failed to show any basis for review by this Court of the decision below.

II.

The Court of Appeals for the Second Circuit correctly held the prior determination of the Court of Appeals for the First Circuit to be conclusive with respect to Commonwealth's claim of rescission for fraudulent inducement.

Commonwealth next urges that the court below was wrong in giving conclusive effect to the prior decision of the Court of Appeals for the First Circuit and that its ruling was contrary to decisions of this Court and inconsistent with the rules applied by other courts of appeals.

An analysis of the decision of the Court of Appeals for the First Circuit and a review of the reasoning employed and cases cited by the court below make it apparent that the decision below was correct and that it is not inconsistent with the decisions of this Court or of any other federal court.

Commonwealth's discussion of this issue tends to obscure the fact that the proceeding in the District Court for the District of Puerto Rico had two aspects. First, there was the proceeding commenced by Commonwealth's complaint in that court; this was an ordinary action for rescis-

sion and damages. Second, there was a motion by Commonwealth, pursuant to 32 Laws of Puerto Rico Annotated § 3204(4)(a), for a stay of the arbitration. This was a separate proceeding which might have been brought independently. It was the same kind of proceeding as that authorized by the corresponding provision of the New York Civil Practice Act, Section 1458(2).

As has been pointed out above, the procedure on a motion to stay arbitration is that the court must first determine whether a substantial issue exists. If a substantial issue is found, a trial must be held. If no substantial issue is shown to exist, the motion must be denied.

The District Court in Puerto Rico found a substantial issue and ordered a trial. The Court of Appeals for the First Circuit, after a careful analysis of the evidence, reversed the District Court's determination that a substantial issue existed. This ruling finally disposed of Commonwealth's motion.

The issue which Commonwealth subsequently sought to raise by the claim of fraudulent inducement which it asserted in the Southern District of New York was precisely the same issue which had previously been litigated and finally determined by the Court of Appeals for the First Circuit.

While the context here is somewhat unusual since it is seldom that a party seeks to litigate the question of arbitrability twice in different fora, and there are consequently few direct precedents, it is apparent that the court below accurately applied traditional principles of *res judicata*.

The court below quite properly analogized the instant case to cases in which a motion for summary judgment has been granted (S. A., p. 105). It is, of course, clearly settled that an order granting a motion for summary judgment constitutes a conclusive determination of the issues adjudi-

cated and is entitled to a *res judicata* effect. E.g., *Martucci* v. *Mayer*, 210 F. 2d 259, 260 (3d Cir. 1954); *Stokke* v. *Southern Pacific Co.*, 169 F. 2d 42 (10th Cir. 1948); *Banke* v. *Novadel-Agene Corporation*, 130 F. 2d 99 (6th Cir. 1942), *cert. denied*, 317 U. S. 692 (1942). A decision on such a motion, like the decision of the First Circuit here, determines that no substantial triable issue has been raised.

There are precedents directly in point in the New York Courts. As the court below pointed out in its opinion, the New York Courts have held that an order directing arbitration, *Matter of Marchant* v. *Mead-Morrison Manufacturing Co.*, 252 N. Y. 284, 169 N. E. 386 (1929), and an order refusing a stay of arbitration, *Reo Garment Inc.* v. *Jason Corp.*, 6 App. Div. 2d 401, 178 N. Y. S. 2d 368 (1st Dep't 1958), *aff'd*, 6 N. Y. 2d 725, 158 N. E. 2d 505, 185 N. Y. S. 2d 812 (1959), are *res judicata*.

The court below also properly emphasized the practical necessity of such a rule if repetitive and time-wasting litigation of the question of arbitrability is to be avoided.

The principal decisions now cited by Commonwealth in opposition to the ruling of the Court of Appeals are *Kloeb* v. *Armour & Co.*, 311 U. S. 199 (1940), and *Hoffman* v. *Blaski*, 363 U. S. 335 (1960). It is interesting to note that Commonwealth, in arguing to the Court of Appeals, did not regard these decisions as sufficiently relevant to warrant their inclusion in its briefs. It is submitted that Commonwealth's judgment in omitting these cases from its briefs in the court below was sounder than its judgment now.

The *Kloeb* case involved the peculiar situation which existed prior to 1948 whereby a petition for removal of a case from a state to a federal court was first to be filed in the state court. Under that procedure it was possible for the question of removability, *i.e.*, the question whether the

federal court had jurisdiction, to be ruled upon both by the state and by the federal court.

In the *Kloeb* case the state court had held the case to be removable. The federal District Court held that it was not bound by the state court's determination of the existence of federal jurisdiction. The Court of Appeals reversed the determination of the District Court and held that the state court's ruling was binding.

The actual holding of this Court in the *Kloeb* case is in no way relevant here. The holding was merely that the statutes governing removal and remand barred any review by the Court of Appeals of the District Court's decision.

Even the dictum upon which Commonwealth apparently relies is entirely irrelevant. The Supreme Court said merely that the federal court was free to determine its own jurisdiction and that it could not be bound *on this question* by the prior ruling of the state court. That this was the sense of the *Kloeb* case has been recognized in all subsequent discussion of that case. See, e.g., *Note*, 98 *University of Pennsylvania Law Review* 80, 81 (1949); *Note*, 50 *Yale Law Journal* 158 (1940). See also *Chesapeake & Ohio Railway* v. *McCabe*, 213 U. S. 207 (1909). In the converse situation it has been recognized that a determination by the federal court that it does have jurisdiction is conclusive in subsequent state court proceedings. E.g., *Chesapeake & Ohio Railway* v. *McCabe*, *supra*. It is therefore clear that the *Kloeb* case cannot properly be cited for any general principle of non-finality.

The decision of a divided court in *Hoffman* v. *Blaski*, *supra*, is of no more relevance than the *Kloeb* case. In the *Hoffman* case an unusual situation was presented in which the District Court for the Northern District of Texas had ordered a transfer, under 28 U. S. C. §1404(a), of an action commenced in that court to the United States District Court

for the Northern District of Illinois. The Court of Appeals for the Fifth Circuit declined to issue a writ of mandamus to review that decision. The District Court in Illinois received the transfer and denied a motion to remand the case to Texas. On review by the Court of Appeals for the Seventh Circuit it was held that the transfer was unjustified and the case should be remanded to Texas.

A majority of this Court held that, for various reasons arising out of the peculiarities of the situation which had developed in that case, the decisions of the Texas District Court and the Fifth Circuit could not be regarded as conclusive. One of the bases for this decision was the majority's view that the order of the Texas court "did not purport to determine the jurisdiction of the transferee court and therefore did not preclude Judge Hoffman of power to determine his own jurisdiction, nor did it preclude the power of the Seventh Circuit to review his action" (363 U. S. at 340, note 9). The majority also took the view that the Fifth Circuit, by declining to entertain the petition for mandamus to protect its appellate jurisdiction "did not thereby determine that the Illinois District Court had jurisdiction of the action." The majority opinion also noted that the ruling of the Texas District Court was interlocutory and not upon the merits. As has been pointed out above, this is not the case with respect to the order before the Court now. Here the order of the Court of Appeals for the First Circuit was final because it finally disposed of Commonwealth's motion to stay arbitration. It was on the merits because the basis of the court's decision was that the evidence presented by the parties on the substantive issues raised by the motion demonstrated that no substantial issue existed.

The rule properly applicable in this case, and which the Court of Appeals applied, was well stated by this Court

in *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U. S. 522 (1931):

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause" (283 U. S. at 525-26).

Nor are the court of appeals' cases which Commonwealth cites in any way inconsistent with the ruling of the Court of Appeals here. Commonwealth states at page 24 of its petition that certain decisions of the Seventh and Eighth Circuits have expressed a rule contrary to that applied here by the Second Circuit. The cases cited, however, are cases standing only for the familiar proposition that a ruling which grants or denies a preliminary injunction is not decisive of the merits of the litigation in which it is entered. The Court of Appeals in this case recognized that rule in its opinion in distinguishing the cases relied upon by Commonwealth (S. A., pp. 102-03). Far from disagreeing with the cases which Commonwealth cites, the court below recognized the validity of those decisions but concluded that they were inapplicable to the case before it.

The court below was plainly on solid ground in distinguishing the cases relied upon by Commonwealth. In the ordinary case where a motion for a preliminary injunction is made and is denied, the party seeking injunctive relief may still move forward with his suit for a permanent

injunction. In granting or denying preliminary injunctive relief the Court customarily makes no effort to weigh the ultimate merits of the suit; thus the tentative conclusions which form the basis for the order with respect to temporary injunctive relief cannot properly be given effect as an adjudication of the merits.

In contrast, where, as here, a motion for stay of arbitration is made, and when it is determined that no substantial issue as to arbitrability has been shown, there is no occasion for a trial or for any other judicial proceedings. The merits of the litigation have been determined and the matter is at an end.

Even if the judgment of the Court of Appeals for the First Circuit could be regarded as in some sense interlocutory, this would not deprive it of conclusive effect. In numerous decisions the federal courts have held that interlocutory decisions are frequently conclusive with respect to issues actually litigated and determined. E.g., *Larkin Automotive Parts Co.* v. *Bassick Manufacturing Co.*, 19 F. 2d 944 (7th Cir. 1927); *Sewerage Commission of City of Milwaukee* v. *Activated Sludge*, 81 F. 2d 22, 23 (7th Cir. 1936); *Bee Mach. Co., Inc.* v. *Freeman*, 131 F. 2d 190, 193 (1st Cir. 1942), *aff'd*, 319 U. S. 448 (1943); *J. R. Clark Co.* v. *Jones & Laughlin Steel Corp.*, 288 F. 2d 279 (7th Cir. 1961), *cert. denied*, 368 U. S. 828 (1961); *Carson Investment Co.* v. *Anaconda Copper Mining Co.*, 26 F. 2d 651 (9th Cir. 1928).

The Court of Appeals accurately applied the principles of *res judicata* which have been formulated and applied in the federal courts and there is no reason for this Court to review its judgment. Even if there could be any question as to the correctness of the decision, however, there would be no warrant for intervention by this Court. The decision

below revolved around the construction of the particular opinion and judgment entered by the Court of Appeals for the First Circuit, an assessment of the intention of the First Circuit, and a determination of what effect should be given that judgment under the particular circumstances of these proceedings. It is apparent that no issue is raised which calls for consideration by this Court.

III.

The Court of Appeals properly considered and determined the issues of arbitrability which it regarded as not conclusively determined by the First Circuit.

Commonwealth next objects to the action of the court below in directing Judge Dawson to vacate that part of his order which would have required a trial of certain issues which the court below held had not been adjudicated by the First Circuit. It is Commonwealth's contention that, even though the record contained everything necessary for a resolution of these issues, and even though it was apparent to the Court of Appeals that Commonwealth's contentions were erroneous as a matter of law and any decision in Commonwealth's favor would have to be reversed on appeal, the Court should have allowed the District Court to proceed with an unnecessary trial.

It is submitted that, once the Court of Appeals had determined to entertain the petition for mandamus for the reasons set out above, it was perfectly justified in going ahead with the consideration of the other issues which had been considered and determined by Judge Dawson and in directing Judge Dawson to vacate his erroneous rulings.

It is well settled that when a case is properly before an appellate court for review of an interlocutory order, the

Court is not restricted to the issues raised by the interlocutory order, but may properly consider other rulings made by the lower court. E.g., *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940); *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 (1897); *North Carolina Railroad Co.* v. *Storey*, 268 U. S. 288 (1925). As this Court said in the *Storey* case:

> "By the ordinary practice in equity as administered in England and this country an appellate court has the power on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record and upon deciding them in favor of the defendant to dismiss the bill and save both parties the needless expense of further prosecution of the suit" (268 U. S. at 292).

While Commonwealth suggests (Petition, pp. 26-27) that the record was not complete and that it "had no opportunity to present evidence to rebut the inferences drawn by the Second Circuit from [the evidence submitted by Lummus]," this suggestion is absolutely unfounded. The facts upon which the Court of Appeals relied were established by affidavits and documentary evidence submitted by Lummus. Although Commonwealth had an opportunity to submit whatever affidavits or other evidence it chose to present, it presented nothing which in any way controverted the evidence submitted by Lummus. Indeed, as the Court of Appeals pointed out in its opinion (S. A., p. 110), Commonwealth did not deny, by evidence or otherwise, that the facts were as Lummus stated them to be.

Under all of these circumstances it is clear that the Court of Appeals did not abuse its discretion in holding that Judge Dawson's order should be vacated in all of its aspects.

IV.

Commonwealth's constitutional rights have not been in any way infringed.

The weakness of Commonwealth's petition appears perhaps most clearly in the speciousness of the constitutional argument with which it seeks finally to pique the interest of the Court.

The alleged constitutional issue must be disregarded, first of all, simply because it comes too late. No such issue was presented to or argued before the Second Circuit. Commonwealth in no way suggested in that court that a reversal or vacation of Judge Dawson's order would impair any of its constitutional rights.

This Court has frequently held that on appeal from the decision of a federal Court of Appeals it will not hear issues which were not raised below except in "exceptional circumstances." E.g., *Lawn* v. *United States*, 355 U. S. 339, 362, note 16 (1958). This same rule is applied when an attempt is made to raise constitutional issues which were not previously urged. *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *cf.*, *Ullmann* v. *United States*, 350 U. S. 422, 439, note 15 (1956). There are no exceptional circumstances present here which would justify entertaining a constitutional issue first advanced in this Court.

It is impossible, in any event, to follow the twists and turns of the reasoning by which Commonwealth attempts to suggest that it has been deprived of a constitutional right to litigate the question whether it consented to the agreements to arbitrate.

Commonwealth has at all times admitted that its contracts with Lummus contained arbitration clauses and that

it signed those contracts knowing that they contained those clauses. Under these circumstances, there could be no constitutional defect in a rule which said that the arbitration clauses are separable agreements and that, by signing the contracts in which they were embodied, Commonwealth consented to the arbitration of every issue which might arise between the parties. There is nothing to the contrary in *Dorchy* v. *Kansas*, 264 U. S. 286 (1924), or *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 (1923), relied on by Commonwealth (Petition, p. 28).

Here, however, no such rule has been applied. Commonwealth has litigated for nearly three years on this very question of "non-consent" with respect to which it claims it has not been adequately heard.

It was precisely this claim—that it had not validly consented to the making of the arbitration agreement—upon which Commonwealth compiled a record in the District Court in Puerto Rico which totalled some 588 printed pages. It was precisely this issue which the Court of Appeals for the First Circuit carefully considered and found to be insubstantial. It was precisely this issue that the Court of Appeals for the Second Circuit held had been finally adjudicated by the First Circuit.

It is difficult to believe that Commonwealth is now serious in suggesting that the requirements of due process have not been met with respect to its right to litigate this question.

Conclusion.

The decision of the Court of Appeals was in all respects correct. Petitioner has presented no issue which would warrant a review by this Court.

Respectfully submitted,

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No. 625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

--against--

THE LUMMUS COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
Introduction	1
Statement of the Case	5
Argument	7
I	7
II	10
III	13
IV	14
Conclusion	15

Table of Cases Cited

PAGE

Bee Mach. Co. v. *Freeman*, 131 F.2d 190 (1st Cir. 1942), *aff'd on other grounds*, 319 U.S. 448 (1943) ..... 12n.

Chessman v. *Teets*, 354 U.S. 156 (1957) ..... 4n.

Ex parte Wagner, 249 U.S. 465 (1919) 13

Gulf Research & Development Co. v. *Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd by an equally divided Court on other issues*, 344 U.S. 861 (1952) 9

Hoffa v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960) 13

Hoffman v. *Blaski*, 363 U.S. 335 (1960) 11, 12

Hormel v. *Helvering*, 312 U.S. 552 (1941) 14

In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961), *cert. denied*, 30 U.S. Law Week 3180 (Dec. 4, 1961) ..... 8n.

Maryland v. *Baltimore Radio Show*, 338 U.S. 912 (1950) ..... 4n.

TCF Film Corp. v. *Gourley*, 240 F.2d 711 (3d Cir. 1957) .....9, 9n.

United States v. *Shubert*, 348 U.S. 222 (1955) .. 4n.

United States v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950) 6

Weems v. *United States*, 217 U.S. 349 (1910) ... 15

Statutory Materials

28 U.S.C.:

§ 1291 .....10, 11

§ 1292(a)(1) .....3, 3n., 10, 11n.

§ 1651 (All Writs Act) 7, 8, 13, 14

IN THE

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THE HONORABLE ARCHIE O. DAWSON,
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—against—

THE LUMMUS COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

The Lummus brief in opposition would have this Court believe that the issues at stake here are disarmingly simple and without significance. To this end, Lummus restates the questions presented in Commonwealth's petition in a way obscuring the far-reaching ramifications of the Second Circuit's decision.

Thus, Lummus' counterstatement fails to meet the serious issue raised by the Second Circuit decision concerning the proper scope of mandamus in the federal courts. Lummus would make it appear that the Second Circuit granted mandamus in large part because it found extraordinary circumstances in the fact that litigation has been pending between the parties for some 30 months. Lummus' objective is to convey the impression that the Second Circuit's decision turned on special factors in the case at bar and has no general application.

The facts are otherwise. The Second Circuit specifically stated that it would "not decide whether the fact that the delay in this case has already lasted for some thirty months would alone constitute an 'exceptional circumstance' " (S.A. 98). The Court proceeded to place its holding exclusively upon the ground that mandamus would issue to prevent relitigation of a "final" determination by another Court of Appeals (S.A. 98, 104).*

Lummus also would cloud the issues raised by the Second Circuit's new definition of "finality". As stated by Lummus, the second question presented would be whether the Second Circuit properly held that a District Court must give conclusive effect to what Lummus says was a "final determination" by the First Circuit, of the "identical issue" before the District Court, in "the same case" (Resp. Br. 2).

As fairly stated by Commonwealth, the second question is whether a District Court is bound to give conclusive effect to a previous decision *rendered on interlocutory appeal,* in related proceedings, by a Court of Appeals of another Circuit. As so stated, the question raises issues of substantial significance concerning the finality of judgments in the federal courts.

---

* The Court stated:

". . . . Here *Lummus asserts* the District Judge has directed reexamination of an issue that has been conclusively determined in its favor by another Court of Appeals. The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial . . . the right to trial before an unbiased judge . . . or the right to trial directly by a judge rather than initially by a master . . . . *Accordingly* we think the case appropriate for mandamus *if Lummus' assertion* is made out, as we find it to be." (Italics added; S.A. 98)

In Lummus' counterstatement, the decision rendered on interlocutory appeal receives the Orwellian label "final determination".* This, of course, is an attempt to sidestep the issue and to transform what was presented by Commonwealth as a potentially fruitful juridical inquiry, as to "finality" of interlocutory rulings, into a question-begging premise. This and other inadequate descriptions furnish the basis of nearly the whole of Lummus' brief, making that document one hardly responsive to the issues raised in the petition.

Lummus' counterstatement cannot obscure the importance of the issues raised. The effect of the Second Circuit's decision is, as Commonwealth has stated, to:

> 1. Enlarge the scope of the extraordinary writ of mandamus by using it to reverse a District Court determination, unappealable at that stage, solely on the ground that the District Court did not consider itself bound by an earlier decision of the First Circuit rendered in a related proceeding on an interlocutory appeal taken under § 1292(a)(1);
>
> 2. Extend the concept of "finality" of judgments to the point that "conclusive" effect now must be given to decisions rendered on interlocutory appeal where, vaguely, "a court sees no really good reason for permitting it [an issue]

---

* It is somewhat astounding that neither in its counterstatement nor at any other point in its brief does Lummus allude to the fact that the appeal taken to the First Circuit by Lummus was pursuant to 28 U.S.C. § 1292(a)(1), allowing appeals from "Interlocutory Orders" granting injunctions. There is no doubt whatever that this is the fact. The First Circuit so stated in the first sentence of its opinion (R. 473; S.A. 34).

> to be litigated again" (S.A. 104). The only guidelines to this purely discretionary test are to be whether the earlier decision, now to be considered "final", is thought by a second court to have been regarded as "not avowedly tentative" by the court rendering it, and whether the second court thinks there was an adequate hearing and an opportunity for review (*ibid.*).*

Commonwealth's position is that these new departures by the Second Circuit raise serious questions of policy and precedent in the federal system and that the startling enlargement of the scope of mandamus, and of the concept of "finality", warrants consideration by this Court.**

We consider, herein, only some of the more significant particular errors in the Lummus brief, by which it carries forward its apparent misunderstanding of these fundamental issues raised by the Second Circuit's decision.

References are to the corresponding headings in Commonwealth's petition and the Lummus brief.

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* The issues raised by Questions III and IV presented in Commonwealth's petition are also somewhat obliquely treated in Lummus' brief. A few comments on these matters appear later in this reply.

** Lummus' counterstatement (Resp. Br. 2) also shows a misconception of the effect of this Court's denial of certiorari, which is in no way a determination on the merits or binding in subsequent litigation. *United States* v. *Shubert*, 348 U.S. 222 (1955); *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950); see *Chessman* v. *Teets*, 354 U.S. 156, 164 n. 13 (1957). This misconception is not very material here, however, since the issues in the present action are entirely different from those presented in the earlier petition for certiorari based on the First Circuit decision.

Statement of the Case

This portion of Lummus' answer contains little of direct bearing on the issues. Thus, Lummus initially attempts to argue the factual merits of the various claims which might arise under the contracts if, contrary to Commonwealth's contentions, there were any contracts. It is enough to say that Lummus' allegations with respect to supposed merger of pre-contract guarantees and representations into the contract (Resp. Br. 4), and with respect to acceptance test provisions and other contractual matters (Resp. Br. 4-5), are not relevant to the questions presented here.

Lummus then makes an argument that the First Circuit decision was concerned principally with Commonwealth's motion, in Puerto Rico, for a stay of arbitration (Resp. Br. 5-8). Building on this, Lummus would have this Court infer that the First Circuit found that Commonwealth had not raised a substantial issue as to Lummus' fraud in the inducement of the contracts (see Resp. Br. 2, 8).

The argument misses the mark. As Commonwealth has explained (Pet. Br. 7-8), the First Circuit's decision turned on that Court's consideration of Commonwealth's complaint seeking rescission and damages. The Court's determination was that the complaint was insufficient to support a trial of the fraud issue raised by the complaint, because it was not coupled with an intent to return the consideration (the refineries) to Lummus and because of Commonwealth's apparently late assertion of the fraud alleged (Pet. Br. 9). But the First Circuit specifically and clearly left undisturbed the findings below of Judges

Magruder and Ruiz Nazario that a substantial issue of fraud had been made out. The First Circuit said:

> ". . . Although arguments have been presented on the issues of falsity and reliance, we believe that a substantial issue has been made out. The real difficulty lies in the question of fraudulent (or reckless) intent. . . . But having in mind the intangible nature of fraud, and the inherent difficulties of proof, we are short of willing to reverse the lower court's preliminary findings, and believe it preferable to look into other issues." (R. 484-85; S.A. 47)

It was only the ultimate rulings of those Judges which, because of what the First Circuit felt to be the insufficiency of the complaint for rescission, were overturned.*

On page 8, Lummus attempts to make use of Commonwealth's argument in its earlier petition that the First Circuit had acted improperly in excluding Commonwealth's evidence, submitted by affidavit on petition for rehearing, as to the time of discovery of the fraud, and had thus barred it from a trial of the issues in that proceeding. Commonwealth's argument that the First Circuit seemingly had gone too far could have no effect on the present proceeding (compare: *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198-99 (1950)).

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* In Lummus' footnote on page 8 of its brief, the word "findings" must be read in careful contradistinction to the word "rulings" to convey an accurate impression of the effect of the First Circuit decision.

ARGUMENT

I

Lummus does not question that the Second Circuit's decision extends the mandamus power to a heretofore virgin area, and barely attempts analysis of the decisions of this Court or of the Courts of Appeal in conflict with the present holding. The Lummus brief merely asserts that the powers granted under the All Writs Act, 28 U.S.C. § 1651, are so discretionary that their exercise, right or wrong, is of little interest to this Court. Lummus supports its position with the sweeping assertion that, with respect to the application of § 1651 by the Courts of Appeal, this Court "has heretofore articulated, insofar as they can be articulated, the principles which should govern" (Resp. Br. 18). In short, the scope of mandamus, according to Lummus, is now fixed and a private preserve of the Courts of Appeal.

Lummus' brief sidesteps by silence most of the difficult questions. It avoids, for example, coping with the important decisions cited by Commonwealth (Pet. Br. 19), in which this Court has declined to sanction mandamus to permit interlocutory review in cases involving principles no more discretionary than the principle of "finality" involved here (Resp. Br. 15, 17). Except for the argument that the Second Circuit's decision can be restricted to the particular facts of this case, an argument which is totally baseless (see pp. 1-2, *supra*), Lummus apparently has nothing to offer but its own conviction that there is some ineffable difference between the Second Circuit's new theory of "finality" and all other principles in the

service of which mandamus has been sought and denied.*

Again, in referring to the Second Circuit's solicitude for a supposed "conclusive determination" by another Court of Appeals (Resp. Br. 15), Lummus artfully dodges the question whether the Second Circuit's definition of "finality" does not itself contain substantial discretionary elements which would make a District Court's determination immune from interlocutory appellate intervention under § 1651 except upon a finding of gross abuse.

It may be added that no finding was made by the Second Circuit, nor did Lummus make any suggestion below, that "public confidence in the courts" was in any way involved in the present action (Resp. Br. 16).**

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* Lummus attempts to fabricate a concession by Commonwealth that the issues before the Second Circuit were "extraordinary" and thus worthy of mandamus (Resp. Br. 15). This is done by citing Commonwealth's good faith joinder in a motion to expedite whatever review there was to be by the Second Circuit. Lummus states that "Both parties had joined in recognizing the *extraordinary* character of the issues presented by the petition for mandamus" (*ibid.*; italics added). This statement has no basis whatever. Neither the word "extraordinary", nor any word in its place, was used in the joint motion. The joint motion specifically stated that

> "Commonwealth Oil Refining Company, Inc., contends that the order of June 23, 1961, is not appealable and should not be reviewed on petition for mandamus and intends by appropriate motion and opposition to bring these contentions before this Court. Joinder in the present motion is not a waiver of these contentions."

** *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), *cert. denied*, 30 U.S. Law Week 3180 (Dec. 4, 1961), cited by Lummus for the proposition that such "public confidence" is a consideration, denied the writ.

It should be noted that Lummus' description of *Gulf Research & Development Co.* v. *Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd by an equally divided Court on other issues*, 344 U.S. 861 (1952), and *TCF Film Corp.* v. *Gourley*, 240 F.2d 711 (3d Cir. 1957) (Resp. Br. 16-17), is misleading. The reservation of decision in the latter case, on the issue whether mandamus should be granted where too little effect had been given to the decision of another district judge, was accompanied with a "But see" citation to *Gulf Research*, where the same Court had held mandamus would not lie to prevent a possibly too broad effect being given to such a decision.*

Lummus' further statement that the Third Circuit's denial of mandamus in *Gulf Research* concerned a lower court order which had "properly" given conclusive effect to the prior ruling of another court (Resp. Br. 16-17) is Lummus' characterization of the order, not the Third Circuit's. The Appellate Court held that even if the lower court had erred in giving effect to the prior ruling, mandamus would not lie to correct the error. 193 F. 2d at 304.

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* Commonwealth of course did not, as Lummus appears to suggest (Resp. Br. 16), present *TCF Film* as a holding on the point. The statement for which Commonwealth cited *TCF Film* was that the Third Circuit "has indicated in a post-*LaBuy* decision that this holding [*Gulf Research*] *would be* given substantial weight if the converse question —of giving too little effect to such a decision— *were to arise*." (Pet. Br. 19-20; italics added.)

II

Lummus' first suggestion under this point is that the First Circuit decision be treated as if it were a final disposition in a separate proceeding for a stay (Resp. Br. 19).* This is both contrary to the actual procedural setting of the former action (see pp. 5-6, *supra*; Pet. Br. 7-9), and ignores the fact that the jurisdiction under which the First Circuit rendered its decision was founded on § 1292(a)(1), and that no judgment final under § 1291 has ever been entered in the Puerto Rican proceedings. Lummus' related proposition, that "the order of the Court of Appeals for the First Circuit was final because it finally disposed of Commonwealth's motion to stay arbitration" (Resp. Br. 22), reveals that Lummus does not even forthrightly support the Second Circuit's discretionary definition of "finality".

The real issue—why the clear statutory guidelines of finality and non-finality applicable to appeals should be abandoned in the federal law of judgments, and a broadly discretionary principle substituted—is nowhere met.

Lummus' reliance on summary judgment decisions (Resp. Br. 20) is misplaced, since each of

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* Because there appears to be some possibility of confusion from Lummus' language on the finality point, it should be reiterated that the Second Circuit made it clear that it regarded fraud in the inducement and the other issues as remaining open to the arbitrators:

> "We add for clarity that we do not hold any determination by the First Circuit with respect to fraud, rescission, etc. to be conclusive save on the limited issue of arbitrability." (S.A. 105 n. 8)

the decisions cited involved the entry of a judgment disposing of the entire action and clearly final under § 1291. The New York decisions which Lummus cites as "directly in point" (*ibid.*) involved orders which, as the Second Circuit conceded (S.A. 104), are deemed under New York law to be final for purposes of the appeal provisions of the Civil Practice Act.*

In contrast, Lummus treats in cursory fashion the decisions of this Court directly rejecting the *res judicata* effect of orders entered on interlocutory appeals. This Court's recent decision in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960) (see Pet. Br. 22-23) is vaguely explained as having been based on "various reasons arising out of the peculiarities of the situation which had developed in that case" (Resp. Br. 22). No analytic attempt is made to show why the rule stated in that decision, that "principles of *res judicata* do not apply" where the orders involved

> ". . . were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction" (363 U.S. at 340 n. 9),

should not apply in the present litigation. Lummus simply asserts (Resp. Br. 22) that the present decision of the First Circuit *was* "final" and *was* "on the merits".

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* Lummus complains there are "few direct precedents" (Resp. Br. 19). There are in fact none if the question is artificially limited to the issues affecting arbitrability, as Lummus attempts to do. But when the question is given its proper scope and related to the conclusiveness of judgments rendered on appeals taken under § 1292(a)(1), the precedents are clear and the conflict with the present decision a palpable one.

If there is any mystic virtue in the issues before the First Circuit which makes those issues more susceptible to "finality" under the law of judgments than those in *Hoffman*, although not final under the law of appeals, then we respectfully suggest that Lummus has failed to put its finger on the difference.

It is difficult to understand Lummus' proposition that "in numerous decisions the Federal courts have held that interlocutory decisions are frequently conclusive with respect to issues actually litigated and determined" (Resp. Br. 24). The cases cited involved a special rule followed by some courts in the field of patent litigation (and even there clearly rejected by others, see Pet. Br. 24-25).*

The final paragraph of this point, modestly disavowing any effect beyond this case for the Second Circuit's new theory of "finality", requires no comment.

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* Each of the decisions cited by Lummus, other than *Bee Mach. Co.* v. *Freeman*, 131 F. 2d 190 (1st Cir. 1942), *aff'd on other grounds*, 319 U.S. 448 (1943), related to suits for patent infringement, in which the previous judgment left open only the matter of an accounting. These decisions (in each of which the determination on the patent issues followed a plenary hearing) are probably attributable to what these courts felt to be the spectacular possibilities for multiple litigation inherent in the patent field, and the historically separate nature and often unusual length of the accounting proceedings. But there is no doubt that, improperly extended as suggested by Lummus (the Second Circuit did not cite them), these cases are in conflict with the numerous decisions noted in the petition on the question of the effect of interlocutory judgments (Pet. Br. 21-25). (In *Bee Mach.*, which was also a patent case, the first court after plenary hearing had entered a decree dismissing the bill of complaint, and leaving only defendant's counterclaims to be decided.)

III

Lummus here ignores the difference between review had in normal proceedings on interlocutory or final appeals and the exceptional appellate intervention permitted under § 1651. Its citation of cases in the former circumstances, with which Commonwealth of course has no quarrel, and its failure to discuss decisions such as *Ex parte Wagner*, 249 U.S. 465 (1919), and *Hoffa* v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960) (Pet. Br. 27), which specifically deny review under § 1651 to prevent prospectively erroneous decisions, appear of a piece with Lummus' consistent refusal to face the issues. Lummus would cover its total lack of precedent by saying "It is well settled that when a case is properly before an appellate court *for review* of an interlocutory order, the Court is not restricted to the issues raised by the interlocutory order" (Resp. Br. 25-26; italics added), but the cases cited and the quotation (Resp. Br. 26) clearly refer to review upon appeal, not review *simpliciter*.

Lummus' position on the Second Circuit's determination of the insurance exception issue is contained in the statement that "The facts upon which the Court of Appeals relied were *established* by affidavits and documentary evidence submitted by Lummus" (Resp. Br. 26; italics added). Offering only this conclusory sentence, and without citing a single mandamus case, Lummus thus considers it settled that the Second Circuit has power under § 1651 to deprive the District Court of its prerogative, already exercised favorably to Commonwealth, of refus-

ing a summary ruling in Lummus' favor on the issue. This the Second Circuit may do, Lummus allows, simply by deciding for itself at this point in the proceedings that Lummus has "established" (1) the purpose and meaning of the insurance provision and (2) what kind of insurance Lummus carries, and then under color of the All Writs Act may proceed to deprive Commonwealth of those protections, including a plenary hearing with the right to cross-examination, which would be normally afforded in our system to a party whom the trial judge believed to have successfully carried an issue beyond the summary stage.*

IV

The important issue raised by this question is of a kind which may be considered, in the discretion of this Court, even if not previously raised below. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941);

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* Lummus makes certain assertions with respect to Commonwealth's position as to the insurance exception issue before the Second Circuit. In this connection it is appropriate to quote from the brief of Commonwealth before that Court:

> "Lummus' argument (Resp. Br. 36-39) depends on extrinsic 'evidence' of an extremely dubious tendency and completeness. The Court below has, therefore, properly found the material presented inadequate and has ordered the issue to trial. To establish a factual foundation for arguing this point Lummus would have to prove its extrinsic evidence, the relevancy of that evidence to the case and the connection between that extrinsic evidence and the supposed relation between the insurance exception and the language of Section 12.10 of the 1954 contract (which is the same as that of Section 12.9 of the 1956 contract) . . . [R. 719]." (p. 27)

Weems v. United States, 217 U.S. 349, 362 (1910). For the rest, Lummus' argument on this point is purely assertive.

Conclusion

The writ of certiorari, as respectfully prayed in the petition, should be granted.

Respectfully submitted,

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